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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, appellant,
v.
TITLE INSURANCE AND TRUST Company et al.
No. 358.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case originated in the District Court for the southern district of California, northern division. The United States was plaintiff and the present appellees were defendants. After complaint was filed, defendants interposed a motion to dismiss, in the nature of a general demurrer; the motion was sustained; plaintiff elected to stand on its complaint; a final decree of dismissal was entered; plaintiff appealed to the Circuit Court of Appeals for the Ninth Circuit; that court, on April 16, 1923, affirmed the judgment below; and from that decision this appeal is taken.

The suit is analogous to a suit to quiet title. In it the United States, as guardian for the surviving remnant of a tribe of Indians from time immemorial living on a certain described tract of land, seeks to have their original title of occupancy and possession, which is fortified by a provision for their protection found in the grant whereby the fee title passed from the Mexican government, confirmed and established as a species of easement or use, to which all rights and titles now belonging to defendants are subject. Compensation is also asked for various acts of wrong and oppression committed by defendants, and an injunction to prevent further molestation of the Indians.

The complaint may be thus summarized:

1. The suit is brought by authority of the Attorney General of the United States at the request of the Secretary of the Interior in furtherance of the Indian policy of the Government, which is here acting as guardian of a band or tribe of Mission Indians, wards of the United States, and incompetent to manage their own affairs, known as Tejon Indians, and from time immemorial residing on a described tract in Kern County, California. The above mentioned officials in bringing the suit are acting not only in the general line of their duty and in defense of the general Indian title of occupancy and use, but also under the specific requirements of the Act of January 12, 1891, 26 Stat. 712, directing them to protect Mission Indians residing within any confirmed private grant in the rights secured to them

both by the original grant and by the Act of the State of California of April 22, 1850 (hereinafter quoted), which provides that proprietors of land on which Indians reside must not interfere with their possession, although they may by judicial procedure obtain a segregation of a sufficiency of land for their separate occupancy, including their home or village.

The jurisdiction of the court is based on the fact that the United States is plaintiff.

2. Defendant Title Insurance and Trust Company, a California corporation, doing business in Los Angeles, has held since September 19, 1916, the fee title to El Tejon Rancho of some 98,000 acres lying partly in Kern County, California. Defendant Security Trust and Savings Bank, also a California corporation doing business in Los Angeles, is trustee under a deed of trust creating a lien on said ranch to secure notes aggregating $1,000,000; and the individual defendants, Chandler, Brant, Sherman and Clark, all of whom are residents of the southern district of California, are in actual possession and control of the ranch under some right or claim of right apparently derived from Title Insurance and Trust Company, but the precise nature and extent of which plaintiff has been unable to learn.

A portion of the ranch lying in said Kern County and comprising 5,364 acres, with water rights appurtenant thereto, is described by metes and bounds as the subject matter of the suit; and for convenience will be hereinafter called the "Indian tract." All

the various titles and rights of defendants in or to said tract are averred to be subject to a right of occupancy, possession and use vested in said Tejon Indians under the following facts:

3. During the entire time of Spanish and Mexican sovereignty over what is now the State of California, and from time immemorial, the Indian tract, and much circumjacent territory, were continuously occupied by the Tejon Indians, ancestors and predecessors of the present tribe, a peaceful and sedentary people, who resided thereon in permanent dwellings, raising crops, ranging cattle, and collecting the natural products of the soil. They were in Spanish and Mexican times and still are under the spiritual charge of the Catholic Church and are described as Mission Indians. Under the laws of both Spain and Mexico these Indians were entitled to the undisturbed possession and use of the land they occupied, together with appurtenant water, for habitation, tillage, pasture, hunting, fishing, gathering the natural products of the soil, and all other ordinary purposes. This Indian right and title was protected by said laws as long as Spain and Mexico held sovereignty over California, and the land in question was charged therewith when it came under the jurisdiction of the United States.

4. Up to May 30, 1843, the Indian tract lay within the public and ungranted lands of Mexico. On that date two Mexicans petitioned the Mexican Governor of California for the grant of a region known as El Tejon, which included the Indian tract;

the regular proceedings were had upon said application, and on June 30, 1845, the grant was finally approved. It contained a condition reading when translated: "They (the grantees) must not interfere with the cultivation and other advantages which the Indians who are found established in said place have always enjoyed." After the United States acquired California under the treaty of Guadalupe Hidalgo, these Mexican grantees petitioned the Board of Commissioners, appointed under the Act of March 3, 1851, 9 Stat. 631, to settle private land claims, for confirmation of the grant. The case was heard and on May 8, 1855, confirmation issued. In its opinion the Board said, with reference to the above-quoted condition in the grant: "This restriction we have heretofore decided does not affect the right of property, though it may create a use in favor of the Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal." On appeal, first to the United States District Court and then to the Supreme Court of the United States, the Board's decision was affirmed, and on May 9, 1863, a United States patent was issued conveying to said Mexican grantees certain described premises including the Indian tract. The granting clause of the patent contained the following language: "But with the stipulation that, in virtue of the 15th section of the said act (March 3, 1851) the confirmation of this claim, and this patent, 'shall not affect the interests of third

persons.' " Thereafter by mesne conveyances the title granted by the patent passed to defendants herein, subject, however, under the facts above recited, to the right of occupancy, possession and use of the Indian tract by the Tejon Indians.

5. The treaty of Guadalupe Hidalgo in terms protected all existing rights and titles; also, the law of the United States and the law of nations, as often announced by the Supreme Court, upheld said Indian right and title in like manner as did the laws of Spain and Mexico. It could be extinguished by the sovereign only and no sovereignty concerned, including the United States, has ever extinguished, modified or diminished it.

Notwithstanding this, the successors of the original grantors, beginning probably about 1888, commenced a course of oppression and exclusion, gradually forcing the Indians back from the outer limits of the Indian tract, pulling down their houses, destroying their crops, throwing their cultivated fields into cattle range and in other ways narrowing the limits and restricting their use of the land. Defendants, when they acquired title, retained and devoted to their own use the land thus wrongfully appropriated, and threaten to continue to hold it and perpetually to exclude the Indians therefrom.

Further, defendants have continued and extended the same policy of repression and exclusion, and have made it impossible for the Indians to possess or use the greater portion of the Indian tract at all, or any portion of it peaceably or securely. They refuse to

permit any Indian to own so much as one cow to furnish milk for children, or to own horses except so far as they are useful on defendants' ranch, on which some of the Indians labor, or to allow them to improve or repair their huts even when the occupants have obtained material for the purpose. They have interfered with the use by the Indians for irrigation of the creeks flowing through the Indian tract; they have fenced off and are using land once cultivated by the Indians, and still needed by them for their subsistence; when Indians have died or been driven out, they have pulled down their houses, destroyed their improvements, and turned their cultivated ground into cattle range, and they have by duress compelled many of the Indians employed on the ranch to submit to a deduction from their wages, under the guise of rent for the premises occupied by them.

Up to the present the result has been that the number of the Indians has been reduced from about 300 to about 80, and the land occupied by them has been diminished from 5,364 acres to about 65 acres, which last mentioned tract is still occupied, used, and cultivated by the remnants of the band. Defendants, however, are still pursuing oppressive courses such as above described and threaten to continue so to do until all the Indians are driven from the Indian tract and their possession and use thereof are totally destroyed.

6. The Indian right of occupancy and use includes the right of ingress and egress to and from said Indian tract over roads connecting said tract

with the county roads. It includes a first and prior right of immemorial antiquity in Tejon and Cedar Creeks flowing through the Indian tract to enough water to irrigate the irrigable portions thereof, estimated at 7 cubic feet per second. About 350 acres of the tract are riparian to and continuously irrigable from these creeks and an additional acreage is irrigable therefrom for early crops. Continuously since 1843 and from time immemorial, the irrigable acreage has been irrigated and cultivated by the Indians except as and when they have been restricted and prevented by defendants, and the acreage still remaining in Indian possession is irrigated by them to the fullest extent permitted by defendants. From 600 to 900 acres of the Indian tract have been cultivated and cropped by the Indians during the same period except as and when defendants have prevented. The remainder has been in their use for cattle range, hunting and gathering the natural produce of the soil, as hereinabove indicated.

A map showing the Indian tract, the land now irrigated and cultivated by the Indians, the land formerly irrigated by them, the arable land within the tract, the former and present irrigation ditches and other details, is attached as an exhibit to the complaint and is reproduced in the Record.

7. Damages for the wrongful acts of defendants are asked under three heads; (a) for the appropriation and use by defendants of the portions of the Indian tract from which the Indians were expelled

by defendants' predecessors, $75,000; (b) for the expulsion of the Indians from other portions by defendants, with continued possession and use thereafter, $2,500; (c) for the further molestation of the Indians and restrictions and limitations placed on their use and enjoyment of what they still possess, $50,000.

The prayer is for answer and discovery; for the establishment and confirmation of the Indian title as against the fee title and all other titles of defendants; for a permanent injunction forbidding interference with or molestation of the Indians in their possession and use of the Indian tract, with a temporary injunction, *pendente lite;* for damages in the sum of $127,500, and for general relief.

MOTION TO DISMISS.

Defendants moved to dismiss the bill "on the ground that the same does not state any matter of equity entitling plaintiff to the relief prayed for, nor to any relief, nor are the facts stated sufficient to entitle plaintiff to any relief against these defendants or any of them."

In support of this they presented two contentions:

1. That the patent issued by the United States to defendants' predecessors in interest is conclusive of the title of defendants, and that such title is free from any and all claims of the nature attempted to be enforced by the complaint.

2. If the Indians had any claims prior to the issuance of the patent, they were abandoned by failure to present them to the Land Commission.

Both of these rested on *Harvey* v. *Barker*, 126 Cal. 262, affirmed in *Barker* v. *Harvey*, 181 U. S. 481.

The Court sustained the motion and dismissed the suit without rendering an opinion.

The appeal submitted three main propositions to the Circuit Court of Appeals:

1. The Indian right of occupancy and use is a remnant of the complete Indian ownership and title existing before the Spanish Conquest. It is original and not derivative. It was not *created* either by Spain or Mexico, but was uniformly acknowledged and protected by both; and in the case at bar is fortified by an injunction against interference with it, incorporated in the grant by which the fee title passed into private hands. It is guaranteed by the Treaty of Guadalupe Hidalgo, and has at all times been upheld by the courts of the United States as a title as sacred as the fee itself. Since, however, it belongs to helpless wards of the nation, unable through ignorance and poverty to protect themselves, it is the settled rule, both of Congress and of the courts, to resolve every doubt in its favor. It is never extinguished inferentially, silently, or without compensation.

2. The Act of March 3, 1851, 9 Stat. 631, not only does not require primitive Indians, *non sui juris*, to appear before the Commission created by that act, there to maintain the unwritten right of occupancy, under penalty of losing it, as was held below, but distinctly expresses a contrary purpose. It exacts affirmative action, not from the Indians, but from

the Commission, which is instructed to investigate that right or title, with power to report on it, but not to adjudicate it. In other words, tested by its own plain language or by any rule of construction, it consists with and follows the general principles summarized above. The construction adopted by the trial court, however, attributes to Congress the dishonorable purpose covertly to extinguish, without compensation, the possessory title of all Indians in California and to throw them helpless on the world, by imposing a requirement of which they would never learn, and with which they had neither the knowledge nor the resources to comply, even if they did learn of it.

3. *Barker* v. *Harvey*, 181 U. S. 481, on which the decision below rested, is distinguishable, both in fact and in law, from the case at bar and does not govern it. Further, the expressions in it apparently favorable to appellees, are at variance with all other Supreme Court decisions relating to the Indian occupancy title. Still further, they were unnecessary to the disposition of the issues then before the court and in that sense are extra-judicial.

The Court of Appeals in its opinion (288 Fed. 821) ignored all argument under the first two heads, and held that *Barker* v. *Harvey* controlled the case.

ASSIGNMENTS OF ERROR.

The assignments of error may be thus summarized: 1. The Circuit Court of Appeals erred in affirming the judgment of the District Court dismissing the

bill of complaint, and in holding thereby that the matters set forth in the bill are not sufficient to entitle plaintiff (appellant) to any relief, and in holding, in effect, that defendants' (appellees') title was not and is not now charged with and subject to the Indian right of occupancy, use and possession described in the complaint. (Nos. 1, 2, 8, 12.)

2. That court erred in holding that the Act of March 3, 1851, required the Tejon Indians to appear before the Board of Commissioners created by said Act, there to set up and maintain their tribal title of occupancy and possession, or for any purpose, or at all; and in holding that by failure so to do, they lost the rights outlined in the complaint. (Nos. 9, 13, 17.)

3. That court erred in holding, in effect, that the object of said act of 1851 was not fully served when the Mexican grantees mentioned in the complaint presented their title to El Tejon Rancho for confirmation, without presentation by tribal Indians, *non sui juris*, of their unwritten title of occupancy and possession attaching to a portion of the same land. (Nos. 16, 17.)

4. That court erred in holding that *Barker* v. *Harvey*, 181 U. S. 481, governed the case at bar and required a decision in favor of appellees; in failing to distinguish said case from the case at bar, both in fact and in law; and in giving controlling weight to certain expressions in that opinion, as against a great number of Supreme Court decisions to the contrary. (Nos. 3, 4, 5, 6, 7, 18.)

ARGUMENT.

The argument falls under the three general divisions already outlined, viz:

1. The fundamental nature and incidents of the tribal Indian title under Spain, Mexico and the United States, and the special features of the Tejon Indian title here.

2. The true and plain meaning of the Act of March 3, 1851.

3. The bearing, or lack of bearing, of *Barker* v. *Harvey, supra*, on the case at bar; and its meaning and authority, as tested by other Supreme Court decisions.

I.

The general qualities of the tribal Indian occupancy title are commonplaces in this court. Since, however, they necessarily underlie appellant's case, we give a skeleton statement of them, with a few of the supporting decisions, enlarging only on one or two matters which are less ordinary, or more directly important here.

1. *At the time when California passed under the sovereignty of the United States, the Tejon Indians possessed, under Spanish and Mexican law, an undisputed right and title of possession and use of the land actually occupied by them, being the Indian tract described in the complaint.*

Paragraph V of the complaint avers that from time immemorial prior to the date of application for

the Mexican grant here involved, and during the entire period of Spanish and Mexican sovereignty over the present State of California, the Indian tract, with certain adjacent territory, was continuously and exclusively possessed and occupied for agriculture, pasturage and residence by the Tejon Indians, being the ancestors and predecessors of the present tribe or band of that name.

Paragraph X gives details of their cultivation, water rights, and irrigation thereon. Under these facts, both Spain and Mexico, while claiming ultimate domain over the lands in the New World, recognized a possessory right in the aboriginal inhabitants which could be disturbed or extinguished by the sovereign only, and which was protected meanwhile by a long series of enactments of uniform tenor. We quote but one example from the myriad of laws, general and special, to this effect:

> We order that the sale, benefit and composition of lands be made with such consideration that the Indians be *left with, above all, what lands shall belong to them,* as well to the individual Indian as to the communities, and *the waters and places of irrigation; and the lands in which they have made ditches for irrigation or any other benefit, with which, by their personal industry, they have fertilized, shall be reserved in the first place,* and in no case can they be sold or alienated.
>
> *Recopilacion de las Indias,* Bk. 4, Tit. 12, Law 18; *Hall, Mexican Law,* sec. 49.

Other well known statutes to the same effect are found in:

Recop., Bk. 4, Tit. 12, Laws 5, 7, 9, 14;
Recop., Bk. 6, Tit. 3, Law 9;
2 White's New Recop., pp. 50, 52, 242;
Hall, Mexican Law, secs. 36, 38, 40, 45, 49, 165.

All these Spanish laws survived as a portion of the fundamental law of the Mexican Republic.

Hall, Mexican Law, sec. 85;
Rockwell, Spanish and Mexican Law, pp. 17–18;
American Insurance Co. v. *Canter*, 1 Pet. 511, 542, 544;
Mitchel v. *United States*, 9 Pet. 711, 734.

Hall, sec. 159, summarizing the situation under both governments, says that:

> The Indians are entitled, in equity and good conscience, and even according to the strict rigor of the laws, *to all the lands they have or have had in actual possession for cultivation, pasture or habitation, when such domain can be ascertained to have had any tolerably well defined boundaries.*

The accuracy of the foregoing has also been asserted by this court:

> Spain, at all times, or from a very early date, *acknowledged the Indians' right of occupancy in these lands. . . . The grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and it was not in the*

power of the Spanish Government to authorize any one to interfere with it.

Chouteau v. *Moloney*, 16 How. 203, 228, 239;
Johnson v. *McIntosh*, 8 Wheat. 543, 574, 592.

2. *This Indian right was aboriginal, antedated the sovereignty of Spain and Mexico, and was not derived from either, but was recognized and protected in the amplest manner and from the earliest times, by the laws of both.*

The truth of this proposition is established by the inherent nature of the Indian title, by the language of the Spanish laws and by the repeated decisions of this Court. It has a very special bearing on the construction of the act of 1851, since the obligations of that Act rested only on those claiming lands "by virtue of any right or title *derived* from the Spanish or Mexican Government"; and for that reason we will discuss it later, at the place where it is immediately relevant. For the present, one quotation is sufficient:

> Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, *retaining their original natural rights* as the *undisputed possessors of the soil from time immemorial.*
>
> *Holden* v. *Joy*, 17 Wall. 211, 244;
> *Worcester* v. *Georgia*, 6 Pet. 515, 559.

3. *The Indian title was further acknowledged and fortified in the case at bar, before the transfer of sovereignty, by the special provision for the protection of these Indians, found in the Mexican grant already quoted.*

This court has frequently recognized that the general law of Spain and Mexico required that in granting public lands to whites, resident Indians should be left undisturbed in their possession.

> *When that was done, the grants were made subject to Indian occupancy.* They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Government to authorize any one to interfere with it.
>
> *Chouteau* v. *Moloney,* 16 How. 202, 239.

Thus the Indian title, protected by general law, remained unaffected even though not mentioned in the grant. Sometimes, however, it received special recognition and protection in the terms of the instrument itself. See *United States* v. *Arredondo,* 6 Pet. 691, 693, and *United States* v. *Armijo,* 5 Wall. 444, 447, where expressions are found similar to the provisions in the grant in this case, that the grantees "must not interfere with the cultivation and other advantages which the Indians who are found established in said place have always enjoyed." (Complaint, pars. vi, vii.)

We ask the court to notice that the Tejon Indian title *does not rest on this protective condition in the grant.* Its real foundation is its status as an original right, admitted by a uniform series of general enactments of Spain and Mexico; and its specific mention in the grant is merely a recognition that it was an existing right.

At the time of the Treaty of Guadalupe Hidalgo, therefore, the Tejon Indian title, thus generally acknowledged and specifically admitted to exist, was as clear, definite and sacred as any property right existing in Mexico.

4. *By the Treaty of Guadalupe Hidalgo, the United States contracted to preserve and protect all existing rights of property recognized by Mexico, including the foregoing title and right possessed by the Tejon Indians at the date of that treaty.*

It is unnecessary to quote or discuss Articles VIII and IX and paragraph 2 of the Protocol of this treaty (9 Stat. 922, 929, 930), since this court has repeatedly given the broadest possible interpretation to the protective language thereof. It covers "all just rights which could have been claimed from the Government they [the United States] superseded."

> *United States* v. *Anguisola*, 1 Wall. 352, 358.
>
> It includes "all titles, . . . legal or equitable, perfect or imperfect," and "every species of title, inchoate or complete."
>
> *Knight* v. *Land Ass'n*, 142 U. S. 161, 201.

Speaking with special reference to the act of 1851, the court says:

> It [the Act] recognizes alike legal and equitable rights and should be administered in a large and liberal spirit. *A right of any validity before the cession was equally valid afterwards.*
>
> *United States* v. *Moreno*, 1 Wall. 400, 404.

To the same effect see: *Beard* v. *Federy*, 3 Wall. 478, 491; *Astiazaran* v. *Mining Co.*, 148 U. S. 80, 81; *Ely's*

Adm'r v. *United States*, 171 U. S. 220, 223, and many other cases.

In *Barker* v. *Harvey*, 181 U. S. 481, 486–7, the court, quoting from the *Astiazaran* case, *supra*, admits that the Indian possessory title falls within the class which the United States by the treaty undertook to respect.

5. *This Indian title presented no novelty under American law, because at all times in the history of our jurisprudence the law of the United States was, and still is, practically identical with that of Spain and Mexico in this regard, namely, that Indians have an original right* **and title of occupancy, possession and use prior to the right or title of Spain, Mexico or the United States, which** *can be extinguished only by the sovereign, and which, until so extinguished, is as sacred as the sovereign title or the fee title.*

This is elementary law, announced in a long series of decisions by this court.

Johnson v. *McIntosh*, 8 Wheat. 542, 543, 574, 587, 603;
Worcester v. *Georgia*, 6 Pet. 516, 579, 584;
Mitchel v. *United States*, 15 Pet. 52, 83;
Doe v. *Wilson*, 23 How. 457, 463;
Buttz v. *Northern Pac. Ry. Co.*, 119 U. S. 55;
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 564;
Cramer v. *United States*, 261 U. S. 219, 227.

The dignity of this title is thus described:

> The Indians have rights of occupancy to their lands *as sacred as the fee simple absolute title of the whites.*

Cherokee Nation v. *Georgia*, 5 Pet. 1, 48;
United States v. *Cook*, 19 Wall. 591, 593.

But it must never be forgotten that this title is held by wards at all times needing the protective care of the Government, and incapable, both in fact and in law, of managing their own affairs.

6. *The Indian title is both legal and equitable in its nature and has been variously likened to an easement, life estate, trust or use with which the fee is charged.*

It is not necessary, for the purposes of this case, to determine the exact nature of the tribal Indian title. Indeed, it cannot be definitely placed in any of the recognized classes of titles, and is probably *sui generis*. What is important, however, is to notice that it possesses both legal and equitable attributes, as this court has often announced.

> They [the aborigines] were admitted to be the rightful occupants of the soil, *with a legal as well as a just claim* to retain possession of it and to use it according to their discretion.
>
> *Johnson v. McIntosh*, 8 Wheat. 542, 574.
>
> That *an action of ejectment* could be maintained on an Indian right to occupancy and use is not open to question.
>
> *Marsh v. Brooks*, 8 How. 223, 232.
>
> A tenant for life has all the rights of occupancy in the lands of a remainder man. *Indians have the same rights* in the lands of their reservations.
>
> *United States v. Cook*, 19 Wall. 591, 594.
>
> The fee was in the United States. The Indians had merely a right of occupancy, *a right to use the land*. . . . The discov-

> erers recognized a right of occupancy or a *usufructuary right* in the natives.
>
> *Buttz v. Northern Pac. Ry. Co.*, 119 U. S. 55, 66–7.

Where Indians, with the assent of the United States, conveyed land, reserving a right of hunting and fishing as a portion of their original right of occupancy, this court says:

> We assume that they retained an easement or *profit à prendre* to the extent defined.
>
> *Kennedy* v. *Becker*, 241 U. S. 556, 562.

In speaking of this title as "a right to use," and as "a legal as well as a just claim," this court indicates the equitable attributes which a consideration of the circumstances makes instantly clear. Indians in general are, and the Tejon Indians are specially described in the complaint as being incompetent to manage their own affairs, and wards of the United States. The latter holds the fee, along with the sole power to acquire or extinguish the Indian possession, but if it does either, will, in so doing, resemble a guardian acquiring or extinguishing the title of his ward, which ward is so peculiarly situated as to have no legal protection or redress against the guardian. This is a condition appealing cogently to equity and good faith. Further, when the fee passes from the Government into private hands under a general conveyance, it is, for the time being, only a naked fee. The private grantee has the title, but the Indians have the beneficial use until the sovereign, which alone has the power to interfere, extinguishes such use.

The fee is conveyed with the understanding, express or implied in law, that the Indian possession and use will be undisturbed by the grantee. It is, therefore, a species of lien or trust with which the fee is charged.

> A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases the legal title, in the eye of the law, carries with it to the holder absolute dominion; but behind it lie beneficial rights and interests in the same property, belonging to another. These rights, to the extent to which they exist, are a charge upon the property and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked.
>
> *Seymour* v. *Freer*, 8 Wall. 202, 213;
> *Jones* v. *Byrne*, 149 Fed. 457, 463;
> *Corbin* v. *Holmes*, 154 Fed. 593, 604.

Plainly, the Indian title comes within the scope of this definition. The Government, occupying a fiduciary relation to the Indians and their title, passes the fee to a private grantee with the understanding implied in law, and in this case expressed in terms also, that the latter will respect and protect the Indian right. This creates a resulting trust, with the grantee as a passive trustee. If he violates that trust, as the complaint here alleges to have happended, a constructive trust, or trust *ex maleficio*, also arises.

7. *The Indian title is not extinguished by an unconditional grant in fee by the sovereign.*

This principle has at all times been recognized both by this Government and its predecessors, as this court has frequently pointed out. Considering this point in connection with a Spanish grant, the court, citing an English case, states the general principle thus:

> Thus a grant, even by act of Parliament, which conveys a title good against the King, takes away no right of property from any other; *though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land.*
>
> *United States* v. *Arredondo*, 6 Pet. 691, 738.

In *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, speaking of the claim by the European conquerors of America of "a power to grant the soil while yet in the possession of the natives," it continues, "These grants have been understood by all *to convey a title to the grantee, subject only to the Indian right of occupancy.*"

More specifically, "Both [Great Britain and Spain] made grants without regard to the land being in the possession of the Indians; *they were valid to pass the right of the Crown, subject to their rights of occupancy.*"

United States v. *Fernandez*, 10 Pet. 303, 305.

Where the United States made grants of land in Indian possession, this court has invariably construed them as subject to the Indian occupancy until the Government definitely indicated its intention to extinguish it. The fact that the Indian title was not extinguished "did not prevent the grant of Congress

from operating to pass the fee of the lands to the company. . . . *The grant conveyed the fee subject to this [the Indian] right of occupancy. The railroad company took the property with this encumbrance.*"

Buttz v. *Northern Pac. Ry. Co.*, 119 U. S. 55, 66, 68.

To the same effect see:

Chouteau v. *Moloney*, 16 How. 203, 236–7;
M. K. & T. Ry. v. *Roberts*, 152 U. S. 114, 116;
Fletcher v. *Peck*, 6 Cranch 87, 142;
Mitchel v. *United States*, 9 Pet. 711, 745;
Marsh v. *Brooks*, 8 How. 223, 232;
Beecher v. *Wetherby*, 95 U. S. 517, 525–6;
Wisconsin v. *Hitchcock*, 201 U. S. 202, 213–14;
Cramer v. *United States*, 261 U. S. 219, 227–8.

Of course the case at bar is stronger than any of those cited, because, when the fee passed from the sovereign, the latter in the grant expressly recognized the existing Indian possession and stipulated for its protection; the United States, in §15 of the act of 1851, provided that decrees and patents alike "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons;" and the Commission, in adjudicating the grant here in question, called attention to the recognition therein of a use in favor of the resident Indians. (Complaint, pars. vi, vii, viii.)

8. *The Indian title is extinguished only by words or acts distinctly indicating such purpose, of which there have been none in this case on the part of Mexico or the United States; and in the history of the United States, has been abrogated always under some terms of compensation to the Indians. There has been no compensation here.*

This is the converse and corollary of the proposition just established. Since the Indian title is unaffected by a mere grant of the fee even by act of Congress, and since the Government has authority to extinguish it, such intent to extinguish must be unmistakably shown; otherwise the Indian title continues in unimpaired efficacy. Such is the effect of the cases cited under the preceding head. The Indian title is not extinguished by "grants of the Government not indicating its intention, *either in the express terms, or by the uses to which the lands are to be applied,* to change the possession of the lands."

Missouri etc. Ry. Co. v. *Roberts,* 152 U. S. 114, 118.

In considering sundry ambiguous or conflicting acts of Congress which raised a doubt whether or not certain lands within Indian territory were included in a railroad grant, the court says:

> This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, *negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company.*

Leavenworth, etc., R. R. Co. v. *United States*, 92 U. S. 733, 742;

United States v. *Winans*, 198 U. S. 371, 381-2.

As to compensation, this court, in *Worcester* v. *Georgia*, 6 Pet. 515, 547, after stating that the law applicable to Indians under the British Crown was that "The King purchased their lands *when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them,*" announces that this principle prevailed down to the Revolutionary War and was thereafter adopted by the United States (pp. 548–9; 552, 579).

In like manner, in the *Leavenworth* case, *supra*, (p. 774), this court says:

> If Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured *an adequate indemnity to them.*

A clear expression of both elements of the doctrine above stated is found in the concurring opinion of Mr. Justice McLean, in *Worcester* v. *Georgia*, 6 Pet. 515, 580, viz.:

> The occupancy of their lands was never assumed except *upon the basis of contract and upon the payment of a valuable consideration.* This policy has obtained from the earliest white settlements in this country down to tne present time.

Similarly, *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389, says:

> The Indian's right of occupancy has always been held to be sacred; something *not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.*

The same rule in this regard applies to lands merely subject to the original Indian occupancy as to lands reserved under a treaty or by other governmental action.

Spalding v. *Chandler*, 160 U. S. 394, 403.

It is part of the history of this country that the Government has throughout given practical effect to this rule of law by a long series of treaties with Indian tribes from the earliest times until a different mode of safeguarding their rights was provided. The Indian title was recognized, extinguished by contract, and paid for. Examples will be found in many of the cases cited, as in the *Leavenworth* and *Butz* cases, *supra*.

In view of the foregoing it is unnecessary to point out that the Indian title cannot be extinguished by private violence and aggression.

> The fact of abandonment was the important one to be ascertained. If voluntary, the dominion of the Crown over it (the land) was unimpaired in its plenitude; *if by force, the Indians had the right, whenever they had the power or inclination, to return.*
>
> *United States* v. *Arredondo*, 6 Pet. 689, 747.

The same rule was applied by this court in *Fellows* v. *Blacksmith*, 19 How. 366, 371.

It is assumed that the rules stated under the foregoing eight sub-heads are recognized features of general Indian law. It would have been easy to support them by far more numerous citations. They are set forth in order that the court, approaching the controverted elements of the case, may have in mind the sacredness of the Indian title, its legal and equitable nature, and the facts that it is original and not derived from any government, that a grant of the fee does not affect it, and that none of the governments dealing with it have ever extinguished it except with the free and intelligent consent of the Indians, and upon terms of compensation to them. These matters are important because appellees' construction of the act of 1851 necessarily implies that the Indian title is derived from Spain or Mexico, that it did not remain attached as a use or trust to the land covered by the Mexican grant, after the confirmation, and that the actual, although covert purpose of Congress was, in the case of California Indians, to obliterate, without compensation, and without the knowledge of the Indians, the same title which it protected in all other States and at all other periods of our history.

II.

The Act of March 3, 1851, 9 Stat. 631, not only does not require tribal Indians to appear before the Commission created by that act, there to assert their right to occupancy under penalty of losing it by nonappearance, but distinctly shows a contrary intent. The affirmative action it requires is not by the Indians but by the Commission, which is instructed to investigate that right or title and given power to report thereon but not to adjudicate.

When the United States acquired California in 1848 by the Treaty of Guadalupe Hidalgo, it is a matter of common knowledge that a great number of tracts of land had already been segregated from the public domain and granted to private persons by the governments of Spain and Mexico. Many of these were of vast and indeterminate extent; few, if any, were surveyed; their limiting monuments were often difficult or impossible to identify, and a number were suspected to be fraudulent. It is equally a matter of history that the aboriginal Indians were still living in large numbers everywhere throughout California on granted and ungranted land alike. The uncivilized state of these Indians was recognized in the treaty, as pointed out in *Botiller* v. *Dominguez*, 130 U. S. 238, 244. Meanwhile a tide of population was rapidly occupying the new territory and it was pressingly necessary to ascertain what portion of it was private property and what was public domain to which the general system of land laws might be applied.

The difficulty in applying that system lay in the large numbers, vast acreage, unsettled boundaries,

and uncertain validity of these Spanish and Mexican grants, and when Congress commenced to clear the way by the act of 1851, the grant situation was necessarily uppermost in its mind.

> The Act of March 3, 1851, . . . contemplated primarily *nothing more than the separation of the lands which were owned by individuals from the public domain.*
>
> *United States* v. *Morillo*, 1 Wall. 707, 709.
>
> The Board of commissioners was instituted by Congress to obtain a prompt decision on the validity of private land claims, to enable the government to *distinguish the public land from that which had been severed from the public domain by Mexico.*
>
> *United States* v. *Fossat*, 20 How. 413, 425.

To the same effect:

> *Meader* v. *Norton*, 11 Wall. 442, 457;
> *Thompson* v. *Farming Co.*, *180 U. S., 72, 77.*
> *Botiller* v. *Dominguez*, 130 U. S. 238, 244, 249.

Not that Congress ignored the Indian situation; in §16 presently to be examined it separately and specially instructed the Commission in effect to ascertain what the Indian title was and to report whether it presented any special features under the foreign laws theretofore applicable. But our point here is that whether we survey the remainder of the act generally or examine it minutely, we find it contemplates solely the presentation to the Commission of such formal titles as arose from or depended on *definite grants or concessions from the former gov-*

ernments to private persons, effective in segregating the granted tracts from the public domain. It unmistakably does not contemplate the tribal Indian title of occupancy, *which did not rest in grant.*

Under Spanish, Mexican and United States law alike, this title, until extinguished by affirmative governmental action, attached equally to granted and ungranted land; therefore *its ascertainment would not help to distinguish private land from public domain.*

(1) A general survey of the act of 1851 as a whole is as convincing in this behalf as any argument can be.

The intention of any legislative enactment is primarily to be ascertained from a view of the statute as a whole.

> *Kohlsaat* v. *Murphy*, 96 U. S. 153, 159;
> *Pennington* v. *Coxe*, 2 Cranch, 33, 52;
> *Gayler* v. *Wilder*, 10 How. 477, 496;
> *Heydenfeldt* v. *Mining Co.*, 93 U. S. 634, 638.

We respectfully request the court to read the act, since it is far too long for quotation here. The court's impression cannot fail to be that Congress had in mind a scrutiny of formal titles, regularly deraigned, derived from the former sovereignties, presumably to be upheld by documentary evidence, capable of culminating in a United States patent, negativing the continued existence of any governmental title and presented by claimants *sui juris*, competent to litigate cases, take notice of statutes of limitation, and prosecute appeals. Clearly such

titles are not the tribal Indian title of occupancy nor are these claimants the slightly civilized or totally ignorant tribes of California Indians who had just become wards of the government. In other words, when Congress says in the preamble, that the act was "for the purpose of ascertaining and settling private land claims in the State of California," it means exactly what was then, and always has been the common meaning of "*private land claims*," viz., the claims of private individuals either to actual grants in fee from the former sovereignties, or to initiated but incomplete titles emanating from those sovereignties, capable of ripening into the fee title,—either sort involving the distinction between public and private land.

We are speaking here of the general impression produced by a perusal of the act as a whole. This must needs speak for itself and make its own mark on the mind of the court. Discussion on our part would be irrelevant. We confidently submit that the court's conclusion must needs be that the claims contemplated were what are commonly called Spanish and Mexican grants and not any tribal or informal Indian title. This was all that was necessary to satisfy the recognized purpose of the legislation, to distinguish what still was public domain from what was not.

(2) A detailed examination of the act confirms point after point the impression given by a general view.

We pass with a mere mention a slight but significant word in the title, which reads, "An Act to Ascertain and Settle *the* Private Land Claims, in the State of California"—obviously meaning in the common use of language *the* set of private land claims that everyone knew of and was then talking about—*the* private land claims which necessitated the passing of the act—*the* Mexican grants which rendered the limits of the public domain so uncertain.

We note but do not dwell on the fact that § 2 requires the appointment of a Secretary, "skilled in the *Spanish* and *English* languages * * * whose duty it shall be to act as interpreter," and that § 4 authorizes the appointment of "an agent learned in the law, and skilled in the *Spanish* and *English* languages" to collect evidence for the United States and to be present on its behalf at the taking of all depositions and testimony by claimants." Depositions were not admissible unless he had been given opportunity to attend.

Clearly it was anticipated that the commission would deal with Spanish-speaking claimants and grantees, and that Spanish was the other language besides English in which testimony was expected. Yet California was populated by thousands of Indians, speaking their various languages and occupying much of their original territory on plains and mountains. Certainly they did not all speak Spanish. If Congress intended to require all these primitive and helpless people to appear and maintain their right of occupancy, ordinary fairness would have dictated

some arrangement whereby interpreters skilled in their languages could be engaged and paid as occasion arose. Yet there is no provision in the act for interpreters except as above cited. The natural inference is that Congress had in mind such claimants only as had become sufficiently Mexicanized to apply for and obtain land grants and whose knowledge of Spanish might reasonably be presumed.

(3) Section 8, however, defines the class of persons contemplated by the act and the nature of their land claims in plain language which *absolutely and necessarily excludes the Indians and their right or title*—

> And be it further enacted, That each and every person claiming lands in California *by virtue of any right or title derived from the Spanish or Mexican government*, shall present the same to the said commissioners when sitting as a board.

Titles so derived alone are within the scope of the act. But the Indian title was not so derived. The act therefore did not require its presentation.

That the Indian right is original and not derived from Spain, Mexico or any sovereignty has already been briefly indicated under I (2) *supra*. That it is a surviving element of an original and absolute ownership of the soil prior to European conquest, or in other words an exception from the absolute domain and ownership claimed by the conquerers, and not a mere license to enjoy a possessory right granted by the conquerors after a total obliteration of the orig-

inal Indian ownership, is clear in the nature of things, was so regarded by Spain and Mexico, and has been established by decisions of this court.

(a). The Indians had complete dominion and full possession when the Spaniards arrived; under the Bull of Pope Alexander VI and by right of conquest the dominion, including the right to acquire or extinguish the possessory title, passed to Spain; but the actual possession, although impaired by *vis major*, was never entirely destroyed, and where it persisted was recognized and the right to extinguish it expressly waived by a multitude of enactments of which a specimen has been quoted. In the case at bar the original possession of the tract by the Indians remained undisturbed during the entire period of Spanish and Mexican sovereignty, and still persists in part.

(b). That this Indian title was recognized as original and not derivative is also seen from the language of the Spanish laws. "To the Indians should be *left* their lands, cultivated ground and pastures" (Recop. Bk. 4, Tit. 12, Law 5); the sale of land shall be so made "that the Indians shall be *left* with, above all, *what lands shall belong to them*"; the lands which their industry has fertilized "*shall be reserved* in the first place and in no case can they be sold or alienated" (Ib. Law 18); "that they keep them *as they have held them previously*" (Ib. Bk. 6, Tit. 3, Law 9); "the Indians who *possess* lands within the limits of the government *shall not in any manner be disturbed.*" 2 White's New Recop., p. 242.

(c). These considerations are mentioned without being stressed because the fact that the Indian possessory title is a surviving element of their original complete title is established by repeated decisions of this court.

> The rights of the original inhabitants were in no instance entirely disregarded but were necessarily to a considerable extent impaired. *They were admitted to be the rightful occupants of the soil with a legal, as well as just claim to retain possession of it,* and to use it according to their own discretion; but their rights to complete sovereignty . . . were necessarily diminished . . . While the different nations of Europe *respected the right of the natives as occupants,* they asserted the ultimate dominion to be in themselves.
>
> *Johnson* v. *McIntosh,* 8 Wheat. 543, 574.
>
> The absolute ultimate title has been considered as acquired by discovery, *subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.*
>
> *Ib.,* p. 592.
>
> It (the principle that discovery gave title) regulated the right given by discovery among the European discoverers; but *could not affect the rights of those already in possession, either as original occupants,* or as occupants by virtue of a discovery made before the memory of man. It gave an exclusive right to purchase, *but did not found that right on a denial of the right of the possessor to sell.*
>
> *Worcester* v. *Georgia,* 6 Pet. 515, 544.

> The Indian nations have always been considered as distinct, independent, political communities, *retaining their original natural rights as the undisputed possessors of the soil from time immemorial.*
>
> *Ib.*, p. 559.

Where Indians ceded certain territory to the United States, but the latter in the same transaction allowed a reservation of certain sections to designated Indians, the court says:

> It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but *under his original title* confirmed by the government in the act of agreeing to the reservation.
>
> *Gaines* v. *Nicholson*, 9 How. 356, 365.
>
> Spain at all times, or from a very early date, *acknowledged the Indians' right of occupancy* in these lands, but at no time were they permitted to sell them without the consent of the King.
>
> *Chouteau* v. *Moloney*, 16 How. 203, 228.
>
> It is a fact in the case that the Indian title to the country had not been *extinguished* by Spain, and that *Spain had not the right of occupancy*. The Indians had the right to continue it as long as they pleased.
>
> *Ib.*, p. 237.
>
> Beyond doubt, the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the Western continent, deriving

> their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory. . . . Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, *retaining their original natural rights as the undisputed possessors of the soil from time immemorial. . . . Unmistakably their title was absolute*, subject only to the pre-emption right of purchase acquired by the United States as the successor of Great Britain.
>
> *Holden* v. *Joy*, 17 Wall. 211, 243–4.

See also

> *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17;
> *Mitchel* v. *United States*, 9 Pet. 711, 752;
> *Doe* v. *Wilson*, 23 How. 457, 463;
> *United States* v. *Winans*, 198 U. S. 381, 384;
> *Wisconsin* v. *Hitchcock*, 201 U. S. 202, 214;
> *Dick* v. *United States*, 208 U. S. 340, 359;
> *Cramer* v. *United States*, 261 U. S. 219, 229.

The foregoing quotations may seem needlessly numerous, although it would be easy to double the number of similar passages from Supreme Court decisions and increase ten-fold those from the laws of Spain, later carried over into the laws of Mexico. The point, however, is fundamental, and it is worth while to establish it beyond a peradventure.

We do not see how anything could be clearer. Not only do the earlier sovereignties by their own laws recognize the Indian title as original and not derivative, but this court has authoritatively so

stated. Nor could it be otherwise, since the Indians were there when the conquerors came, and remained there continuously, still holding part of what they had held before. Their title might be, and was, *recognized or acknowledged* by the new governments, but it was *derived* from original and immemorial possession, or as this court suggests in *Holden* v. *Joy*, *supra*, from the Great Spirit.

The Mexican and Spanish grant titles were *derived* from those governments; the Indian occupancy title was not. The former, therefore, or any title emanating from those governments, had to be presented to the Commission; the Indians and their title were outside the scope of the act.

In *Barker* v. *Harvey*, 181 U. S. 481, 491, there is a mention of §8, apparently indicating that the claim then before the court was urged not on the basis of the aboriginal Indian title, but as though founded on the provision for Indian protection embodied in one of the Mexican grants there involved, and as involving a right of occupancy so permanent that even the government could not extinguish it. This will be discussed later in our analysis of the *Barker* case. It will be found, however, that that opinion nowhere contraverts any of the foregoing arguments, or asserts that the general Indian title, such as we primarily rely on, was derivative. It could not do so without contradicting a long line of decisions of the same court.

But whatever may have been claimed in the *Barker* case, the provision for Indian protection

found in the grant in the case at bar does not affect our argument, *because it neither created nor professed to create a right or title.* In exact conformity with the law as above outlined, it merely forbade interference *with a right or title already existing.* "They [the grantees] *must not interfere* with the cultivation and other advantages which the Indians who are found established in said place *have always enjoyed.*"

Section 8, therefore, by itself, *conclusively shows that Indians were not within the contemplation of Congress at all, except for the purpose later indicated in § 16.* Congress is presumed to have known the law to be as repeatedly announced by this court, that the Indian title was not derivative. When, therefore, it required only claimants with derivative titles to present them, it definitely excepted the aboriginal title from its requirements. We submit that this point alone is conclusive of the case.

(4). We note various minor indications that the purpose of Congress was to deal with formal grants, complete or incomplete, and not general and aboriginal titles not resting in grant nor evidenced by writings.

The same section (8) requires the claimant to present his claim, "together with such *documentary evidence* and testimony of witnesses as the said claimant relies on in support of such claims."

Section 9 requires that the petition of a defeated claimant on appeal "shall set forth fully the nature of the claim, and the names of the *original and present claimants,* and shall contain a *derajgnment of the*

claimant's title, together with a transcript of the report of the board of commissioners and of the *documentary evidence* and testimony of the witnesses on which it was founded"—with more to like effect.

Of course, these passages by themselves are not conclusive, but they are significant and persuasive. What documentary evidence could Indians produce at the hearing; what deraignment or formal showing of their title could they make in a petition on appeal, and how could they set forth the names of the "original claimants?" No one can read these passages without concluding that Congress in enacting them had in mind *the holders of formal titles evidenced by the regular expediente*—the petition to the governor, the reference of the petition for a report thereon, the report, the grant and the confirmation; *and such title holders individuals, not tribes.* No one can suppose that Congress, it if had intended Indians to appear before the Commission, would not have used language appropriate to include their *unwritten, peculiar and non-derivative title.*

(5) When we come to §13 we find a requirement which, like the limitation in §8, is *absolutely impossible of reconcilement* with the theory that the act contemplated Indians among the proponents of claims. It reads:

> And be it further enacted, that . . . for all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, *a patent shall issue to the claimant* upon his presenting to the General

Land Office an authentic certificate of such confirmation.

If, as our opponents contend, the act required all Indians to present their occupancy title for confirmation under penalty of losing it, it must have contemplated that such title might on proper showing be upheld and confirmed like any other. Whenever, then, the occupancy title upon proof of its existence and continuity was established, under §13, "a patent *shall* issue to the claimant." The language is not permissive but imperative.

But who ever heard of a United States patent conveying to an Indian or an Indian tribe an occupancy title? This title as already noticed is in the nature of an easement or trust with which the fee title is charged, or of a possessory title held by a life tenant against the remainder man. Who ever heard of a United States patent conveying to any grantee such a title, or conveying anything but the fee title? Such fee may be held in trust or may be subject to a use or easement, but it is always the fee that is conveyed.

In the case at bar Indians were in occupation of part of a grant. If they had come before the Commission and made proof of immemorial occupancy would the General Land Office have been obliged to give a patent to them and another patent *to the same land* to the Mexican grantees? No conclusion can be reached under this theory which is not preposterous. The truth is that it is the theory itself that is preposterous Abandon the astonishing and bar-

barous idea that Congress meant to say that child-like aborigines, *non sui juris*, incompetent to manage their own affairs, wards of the United States and under its protection, were to be charged with knowledge of the act and its requirements, were to travel from all quarters of the state of California to San Francisco and there present evidence acceptable to a white man's court of their possessory title, under penalty of being turned homeless and resourceless upon the world; give the act its obvious application to those who were sufficiently alert to have already obtained grants or similar rights from the former governments; and the whole measure becomes a fair, consistent, and reasonable enactment. The other theory attributes to Congress the perpetration of a cynical and inhuman travesty of justice and a substantial and flagrant violation of a treaty just concluded, which at the same time was so clumsily conceived that any Indians who might chance to learn of the attempted robbery and prove their possession would receive *the unheard-of grace of a United States patent for an occupancy title*, fixing that title as a charge forever upon the fee, whether vested in a Mexican grantee who might also receive a patent to the same land, or whether remaining in the United States. In other words Congress was gambling on whether the Indians would or would not learn of the act and appear before the Commission. If they did not, the guardian would succeed under form of law in cheating its helpless wards out of an ancestral right

which had been solemnly pronounced as sacred as the fee simple of the whites and which, only three years previously, the faith of the United States had been pledged to protect; but if by some accident the news should spread among the Indians and the tribes should present their claims, the United States would permanently lose its otherwise acknowledged right to extinguish the Indian title over the greater part of the public lands in the state of California. The whole thing is absurd beyond description.

But it is a familiar principle that statutes should never be so construed as to impute absurd and irrational conclusions to the legislature.

> *Kohlsaat v. Murphy*, 96 U. S. 153, 160.
>
> General terms should be so limited in their application as not to lead to *injustice, oppression, or absurd consequences.*
>
> *United States v. Kirby*, 7 Wall. 482, 486;
> *Church of Holy Trinity v. United States*, 143 U. S. 457, 459, 461;
> *Lau Ow Ben v. United States*, 144 U. S. 47, 59;
> *Hawaii v. Mankichi*, 190 U. S. 197, 213.
>
> There are few surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule.
>
> *International Ry. Co. v. United States*, 238 Fed. 317, 321;
> *Tsoi Sin v. United States*, 116 Fed. 920, 926.

Nor should a construction be given which imputes to Congress a breach of public faith.

> *United States v. Central &c. Co.*, 118 U. S. 235, 240.

The application of either or both of these rules of construction convincingly shows that Congress never intended Indian claims to be presented to the Commission.

(6). That the act did not intend to require tribal Indians to present their occupancy title to the Commission under penalty of its extinguishment, is nowhere better shown than by §16, reading:

> That it shall be the duty of the Commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied or cultivated by Pueblos or Rancheros Indians.

By specifying what was expected and required as to Indian tenures this section excludes everything else.

The Tejon Indians, described as "agricultural, pastoral, sedentary and peaceful," and as "raising crops and pasturing horses, cattle and other stock . . . gathering the natural products of the soil . . . and residing in permanent dwellings," on the Indian tract (Complaint, par. v) are within the description of §16; and the proof will still more clearly show that they were and are not only engaged in agriculture, but were and are "Rancheros Indians" formerly residing in numerous permanent villages or rancherias, one of which they still inhabit.

But if, as appellees' theory requires, all these Indians were obliged to present their land claims or

titles to the Commission, with the result that if those claims were sustained they would be patented, and if they were rejected the land they covered would become a part of the public domain, what is the sense of directing the Commission to "ascertain and report" on their land tenure? Their rights, whatever they were, would be *adjudicated and fixed* and the decree of the Commission would be the best possible report. The absurdity would be the same as if the United States District Court, to which an appeal lay from the Commission, had been directed first to *pass on and decide* all the Spanish and Mexican land claims and then to *ascertain what they were* and make a report on them. Once more appellees' theory comes to a ridiculous conclusion.

The fact is that §16 affirmatively shows that Indians were not expected to present their titles to the Commission. Here is the first and only mention of Indians in the act and the first and only provision which is not expressly or inferentially exclusive of them. Here there is a specific statement of the power and duty of the Commission with regard to Indian titles. Up to this point in the act, and as to all claims derived from the Spanish or Mexican governments, it is to hear and decide; now, as to Indian land tenures, it is to "ascertain and report." *This definition and limitation of its duty is necessarily exclusive.*

> *Expressio unius est exclusio alterius* is a universal maxim in the construction of statutes.

United States v. *Arredondo*, 6 Pet. 691, 724.

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, *by necessary implication prohibited their sale in any other way.*

Smith v. *Stevens*, 10 Wall. 321, 326.

When a statute limits a thing to be done in a particular mode, *it includes a negative of any other mode.*

Raleigh &c. Co. v. *Reid*, 13 Wall. 269, 270.

This court from its first organization until this time have held that this *enumeration of the cases in which it had appellate jurisdiction was an exclusion of all others.*

Ex parte Crane, 5 Pet. 189, 204.

They [the legislators] have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction and *this affirmative description has been understood to imply a negative of such appellate power as is not comprehended within it.*

Durousseau v. *United States*, 6 Cranch, 307, 314.

. . . The general rule that the affirmative description of the cases in which the jurisdiction may be exercised *implies a negative on the exercise of such power in other cases.*

In re Heath, 144 U. S. 92, 93.

See also:

Beley v. *Naphtaly*, 169 U. S. 353, 360;

Cherokee Intermarriage Case, 203 U. S. 76, 94;

Union Pacific R. R. Co. v. *Snow*, 231 U. S. 204, 213.

It necessarily follows not only that the act does not require the presentation of Indian titles, but that, under a universal maxim of statutory construction, by giving the commission definite powers and duties as to Indians and their titles, it excludes from its jurisdiction all other powers, and among them that of adjudication upon these titles. Indian rights, whatever they were, were to be considered apart from the discrimination between valid grants and ungranted public land to make which was the main duty of the Board.

It must not be forgotten that such was the opinion of the Commission itself in this very case where, after referring to the passage in the grant forbidding interference with the Indian possessory title, it says: "*This, however, is a question cognizable before another tribunal.*" (Complaint, par. VII.)

There is a reference to this section in *Barker* v. *Harvey*, 181 U. S. 481, 492, intimating that the requirement of a report on Indian tenures from the Commission was made in anticipation of later action by Congress on Indian titles, based on the report, and that since Congress had taken no such action with regard to the particular Indians then before the court, the deduction was that it did not consider them in need of special protection.

Undoubtedly the report was intended for the information of Congress and as a guide in future legislation; and legislation did follow in the shape of the Act of January 12, 1891, for the relief of Mission

Indians, which will presently be shown to be highly confirmatory of appellant's contentions.

The above passage from the *Barker* case, however, has no bearing on our argument here that the requirement of a *report* on Indian tenures negatives the existence of power in the Commission to *adjudicate* such tenures; which argument seemingly was not presented to the court in that case. Also, we are not here relying on any subsequent action of Congress. Such action might, and does, strengthen our position, but only by way of legislative construction of the act of 1851, and as supplementary to it. We confidently submit that no further or special protection was necessary, because the plain language of that act indicates a purpose to leave the Indian title standing in full force and efficacy until Congress, when more fully informed, should decide whether to confirm or extinguish it, and if the latter, on what terms of compensation.

(7). Bearing in mind on the one hand that the purpose of the act was to segregate private lands from public domain, and on the other that the Indian title is an easement, use or trust, it is clear that in every case the necessary controversy must be between the fee claimant and the United States. This court pursuing this fact to its logical conclusion has specifically held it *improper for the holders of titles subordinate to the fee to present their claims to the Commission.*

In *United States* v. *Fossat*, 20 How. 413, "private and adversary" contestants of the grantee's title opposed confirmation in the name of the United States.

After stating that the intervention of adversary claimants under the act of 1851 was a practice not to be encouraged; after reiterating that the purpose of the proceeding was to distinguish public land from that "severed from the public domain by Mexico," and after emphasizing the fact that the patent did not affect third persons, this court concludes (p. 424):

> The language and policy of these enactments *limit a controversy like the present to the United States and the claimant*, i. e., as the case clearly shows, the grant claimant.

Since the Indian title is in the nature of an easement, use or trust with which the fee title is charged, it will be seen that the same thing is held in *Townsend* v. *Greeley*, 5 Wall. 326, 335, where the court says:

> Whether the legal title thus secured to the patentee was to be held by him charged with any trust *was not a matter upon which either board or court was called to pass.* If the claim was held subject to any trust before presentation to the board the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but *it does not determine the equitable relations between him and third parties.*

Such also was the direct decision of the Board itself as to the fee title now in controversy when it said that "this [the question of the Indian use] is cognizable before another tribunal."

To the same general effect see:

United States v. *Morillo*, 1 Wall. 706, 709;
Meader v. *Norton*, 11 Wall. 442, 457–8;
Carpentier v. *Montgomery*, 13 Wall. 480, 495;
Botiller v. *Dominguez*, 130 U. S. 238, 249;
Monroe Cattle Co. v. *Becker*, 147 U. S. 47, 57.

We submit that the foregoing examination of the act conclusively demonstrates both affirmatively and negatively that Indians were not required to present their tribal title to the Board. Appellees' case, therefore, necessarily collapses.

8. Familiar principles of statutory construction not only support but require the interpretation of the act for which we contend.

We do not concede that there is any necessity to invoke technical rules of construction here. Nothing more is needed than to read the act as a whole, giving its language the ordinary meaning throughout and specially noting the features above referred to merely because they are those particularly relevant to our situation. But if any passages seem to the court ambiguous, there are four recognized rules, any one of which must turn the scale in favor of Indian rights.

(a) In view of the ignorant, dependent and helpless state of the Indians and the assumption of the government toward them of the high obligation of guardian to ward, statutes and treaties are invariably construed liberally in their favor.

> As often affirmed in the decisions of this court, the Indians are in a certain sense the

> wards of the United States and *the legislation of Congress is to be interpreted as intended for their benefit.*
>
> *Marks* v. *United States*, 161 U. S. 297, 303.

Doubtful expressions instead of being resolved in favor of the United States are to be resolved in favor of the weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized *without exception* for more than 100 years.

> *Choate* v. *Trapp*, 224 U. S. 665, 675.

To the same effect see:

> *Fellows* v. *Blacksmith*, 19 How. 366;
> *United States* v. *Kagama*, 118 U. S. 375;
> *Choctaw Nation* v. *United States*, 119 U. S. 1, 28;
> *Cherokee Nation* v. *Railway Co.*, 135 U. S. 641, 652;
> *Frost* v. *Weenie*, 157 U. S. 46;
> *Jones* v. *Meehan*, 175 U. S. 1;
> *United States* v. *Rickert*, 188 U. S. 432;
> *United States* v. *Winans*, 198 U. S. 371;
> *Winters* v. *United States*, 207 U. S. 564;
> *United States* v. *Celestine*, 215 U. S. 278;
> *Tiger* v. *Investment Co.*, 221 U. S. 286;
> *Northern Pacific Ry.* v. *United States*, 227 U. S. 355, 366;
> *United States* v. *Pelican*, 232 U. S. 442;
> *United States* v. *Nice*, 241 U. S. 591;
> *Alaska &c. Co.*, v. *United States*, 248 U. S. 78;
> *Seufert Bros.* v. *United States*, 249 U. S. 194;

Cramer v. *United States*, 261 U. S. 219, 229–30.

Barker v. *Harvey*, 181 U. S. 481, 492, admits the existence of this principle, saying, "this court has uniformly construed all legislation in the light of this recognized obligation," and continues:

> But the obligation is one which rests upon the political department of the government, and this court has never assumed in the absence of congressional action to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians.

This is one of the passages in the decision upon which, to use the language of Lord Eldon, "the mind of man doth not readily fasten." The obligation to resolve doubts in favor of Indians was, under a long line of decisions of the same court, as well settled as the obligation of Congress to legislate with an eye to their helplessness and dependency. What reason or excuse was there for evading it in that single instance? "Congressional action" in the shape of the act of 1851 was before the court. Why not construe it as "this court has uniformly construed all legislation, in the light of this recognized obligation?" What bearing had the absence of "legislation by Congress having special reference to these particular Indians," upon the duty of the court to follow its own estab-

lished rule in construing the piece of legislation then under discussion?

We know no answer to these questions, unless that the facts then before the court differed radically from those of the instant case.

(b) The second rule of construction, equally arising from the peculiar position of Indians in this country, is that general acts of Congress do not apply to them at all unless so worded as clearly to manifest an intention to include them.

> General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them. Constitution, Art. I, §§ 2, 8; Art. II, § 2; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *United States* v. *Rogers*, 4 How. 567; *United States* v. *Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of New York Indians*, 5 Wall. 761; *Case of the Cherokee Tobacco*, 11 Wall. 616; *United States* v. *Whiskey*, 93 U. S. 188; *Pennock* v. *Commrs.*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; *Goodell* v. *Jackson*, 20 Johns. 693; *Hastings* v. *Farmer*, 4 N. Y. 293.
>
> *Elk* v. *Wilkins*, 112 U. S. 94, 100.

Similarly where Congress had made to a railroad company a general grant of alternate sections of land some of which fell within a tract in Indian possession, the court, in deciding that the act did not apply to the latter, said:

> We are not without authority that the general words of this grant did not include an Indian reservation (citing and discussing

> cases). . . . Congress cannot be supposed to grant them by a subsequent law general in its terms. *Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.*
>
> *Leavenworth, &c., R. R.* v. *United States*, 92 U. S. 733, 745.
>
> See also *United States* v. *Nice*, 241 U. S. 591, 600.

This rule is an obvious outcome of the peculiar relations of Indians to the government and the unusual nature of their land tenure. Since their status is exceptional, it is not considered to be covered by general language of statutes in the absence of an unmistakable showing of intent.

As already said, we see no need to resort to rules of construction, but if there is such need, here is the rule. Its application once again relieves Indians from the unjust and unprecedented obligations and disadvantages thrust upon them under appellees' theory.

(c) In paragraph 2 of our main argument we have shown the ample guaranty given by the United States in the treaty of 1848 that it would respect all property rights in the ceded territory, including those of Indians.

Appellees' theory is that by the act of 1851 the government under form of law in effect falsified its pledge by making the preservation of the Indian title conditional upon wild savages, or at best semi-civilized children, becoming aware of the proceedings of Congress; and thereupon within a limited time

convening from distances of hundreds of miles, through wild and unsettled country, extensively occupied by suspicious or warring tribes, at San Francisco, and there appearing unaided before a white man's court, and making formal proof in a foreign language according to a prescribed procedure. This is, indeed, "to keep the word of promise to the ear and break it to the hope." It makes Congress cloak the purposeful confiscation of a title it had undertaken to preserve by means of a dishonorable subterfuge.

But a third principle forbids such conclusion. Statutes must not be so construed as to accuse the United States of bad faith.

> As the transfer of any part of an Indian reservation secured by treaty would also involve a *gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.*
>
> *Leavenworth, &c., R. R.* v. *United States*, 92 U. S. 733, 742.
>
> General terms should be so limited in their application as not to lead to *injustice, oppression* or an absurd consequence.
>
> *United States* v. *Kirby*, 7 Wall. 482, 486.

Quoting with approval an English case, this court says:

> If there are no means of avoiding such an interpretation of the statute (as will amount to a great hardship) a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge *ought to struggle with*

> *all the intellect that he has and with all the vigor of mind that he has against such an interpretation of an Act of Parliament;* and unless he is forced to come to a contrary conclusion he *ought to assume that it is impossible that the legislature could have so intended.*
>
> *Hawaii* v. *Mankichi*, 190 U. S. 197, 214.

To the same effect see:

> *Frost* v. *Wenie*, 157 U. S. 46, 59;
> *Richardson* v. *Ainsa*, 218 U. S. 289, 298;
> *Missouri &c., Ry.* v. *United States*, 235 U. S. 37, 41.

Comment and further citations are unnecessary.

(d) The fourth rule has been fully discussed already under I (8) *supra*, where it was proved by Supreme Court decisions that throughout American history the Indian title has never been abrogated inferentially or without compensation. Our construction of the act of 1851 is consistent with these established principles; appellees' construction is incompatible with them.

The presumption is against a departure from a long-established and uniform course of policy.

> *Morton* v. *Nebraska*, 21 Wall. 660, 669;
> *United States* v. *Munday*, 222 U. S. 175, 182.

9. Contemporaneous legislation, both of the United States and the State of California, and subsequent legislation of the United States, support our construction of the act of 1851 and show that both Nation and State regarded the Indian possession as an admitted right which not only was not to be

inferentially extinguished, but was to be affirmatively protected.

As an aid to ascertain whether or not Congress by the act of 1851 had the purpose, elsewhere unknown in American history, to compel tribal Indians to come into court and prove their title or lose it, it is instructive to note contemporaneous and subsequent legislation relating to California Indians.

(a) The Indian Appropriation Act of September 30, 1850, 9 Stat. 558, reads:

> To enable the President to hold treaties with the various Indian tribes in the State of California, $25,000.

The Deficiency Appropriation Act of February 27, 1851, 9 Stat. 572, provides:

> For expenses of holding treaties with various tribes of Indians in California, in addition to the appropriation of the 30th of September, 1850, $25,000.

Here we see that four days before the Act of March 3, 1851, was passed, the same Congress was providing for the regular procedure followed for nearly a hundred years in the history of this country. Recognizing in the California Indians the same possessory right as that of Indians elsewhere it contemplated treaties whereby the Indians would relinquish title to a portion of their territory in consideration either of money payments, or the protection and confirmation of their title to other lands, or both.

It is impossible to suppose that the simultaneous intent of Congress was to impose upon these Indians

a requirement which would inevitably extinguish almost every Indian title in California without reservation or compensation of any kind.

(b) The Act of March 3, 1853, 10 Stat. 244, 246–7, "introducing the land system into California" (*Newhall* v. *Sanger*, 92 U. S. 761, 765), is another clear indication of congressional intent to respect the Indian title. By this time the two years allowed for presenting claims under the act of 1851 had expired, private holdings had been segregated or were in process of segregation from the public domain, and if appellees' theory were correct, the occupancy right of practically every Indian in California had lapsed through inaction. Yet Congress in providing for the survey of public lands and for the grant of pre-emption rights therein not only excepted from pre-emption "lands claimed under any foreign grant or title," but expressly said "that this act shall not be construed to authorize any settlement to be made on any tract of land *in the occupation or possession of any Indian tribe or to grant any pre-emption right to the same.*"

This absolutely contradicts (1) the idea that Indians must present their rights to the Commission or lose them. It says that Congress recognizes and preserves these rights without any action by the Indian wards. It similarly contradicts (2) the idea that land incumbered with the Indian title is not public domain as *Barker* v. *Harvey* seems to intimate. Congress assumes that it is, but says that private

persons must not take it while the Indian possession exists.

(c) On April 22, 1850, the legislature of California passed a law entitled, "An Act for the Government and Protection of the Indians." Section 2 reads:

> Persons and proprietors of lands on which Indians are residing, *shall permit such Indians peaceably to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and families;* provided the white person or proprietor in possession of such lands may apply to a Justice of the Peace in the township where the Indians reside to set off to such Indians a certain amount of land, and on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, *including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians nor shall they be forced to abandon their home or villages where they have resided for a number of years;* and either party feeling themselves aggrieved can appeal to the County Court from the decision of the Justice; and then divided, a record shall be made of the lands so set off in the court so dividing them, and the Indians shall be permitted to remain thereon *until otherwise provided for.*

The remainder of the act contains a number of provisions relating to offenses by or against Indians. Some of these were amended by the Statutes of 1855, p. 179; 1860, p. 196, and 1863, pp. 743–745;

but none of these amendments affected §2, nor has it or the act ever been expressly repealed. Congress in 1891 held it to be still in force, and if so, appellees by the conduct described in the complaint have violated it long and repeatedly and our cause of action against them might be supported on this ground alone. However, our present purpose is to indicate by comparison with other congressional legislation the meaning of the act of 1851 as to Indian titles, and therefore, without further comment along the above line, we turn to the Act of January 12, 1891, 26 Stat. 712, entitled: "An Act for the Relief of the Mission Indians in the State of California," which refers to the above act. (The court will recall that the Tejon Indians are Mission Indians.)

Section 2 of this act provides for the selection of reservations for each band or village of Mission Indians—

> which reservations shall include, as far as practicable, the lands and villages which have been in the actual occupation of the Indians.
>
> Also: In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed.

The passage first quoted, permanently preserves, as far as possible, the identical and immemorial In-

dian occupancy; the second makes preliminary arrangements looking to the extinguishment of the occupancy title of Indians living on grants, but requires the ascertainment and delimitation of their actual possession. The clear inference is that up to 1891 the Indian occupancy right on grants was still recognized as existing.

The whole act, which is too long for extended discussion here, is of a tentative nature, indicating the knowledge of Congress that the contemplated removal of the Indians from grants to vacant public land might not always be practicable and that the creation of reservations involved difficulties.

And therefore in § 6, Congress provides:

> That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican government, and in an act for the government and protection of Indians passed by the legislature of the State of California April 22, 1850, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

Three sorts of Indian rights are here contemplated; those secured by the Mexican grant; those

set forth in the California act of 1850; and those rights either legal or equitable arising under the general law of the United States or Mexico and enforcible by suit. Our case falls under all three.

Congress when it passed §6 knew of its own act of 1851; it knew that no tribal Indian claim whatever and hardly any sort of Indian claim had been presented under it; yet it recognizes all these classes of rights as still existing and valid, and affirmatively demands their protection and enforcement. *The conclusion that it had never intended to extinguish them is inevitable.*

> If it can be gathered from a subsequent statute *in pari materia what meaning the legislature attached to the words of a former statute*, they will amount to a *legislative declaration of its meaning* and *as governing the construction of the first statute.*
>
> *United States* v. *Freeman*, 3 How. 556, 564.
>
> These several acts of Congress dealing as they do with the same subject matter should be considered not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as *legislative interpretations of the prior ones.*
>
> *Cope* v. *Cope*, 137 U. S. 682, 688;
> *Tiger* v. *Investment Co.*, 221 U. S. 286, 309;
> *Stockdale* v. *Ins. Co.*, 20 Wall. 323, 331;
> *Bowling* v. *United States*, 233 U. S. 528, 535.

(d) The Act of March 3, 1891, 26 Stat. 854, establishing the Court of Private Land Claims to settle Spanish and Mexican titles in New Mexico, Arizona,

Utah, Nevada and Wyoming, is, as this court has observed, different in various features from the act of 1851, although similar in many others. Under the latter class it makes clear that formal or record titles alone were to be adjudicated (§ 6), confines confirmation to such titles as were "lawfully and legally derived" from Spain, Mexico or a Mexican State (§ 13); and repeatedly protects adverse or subordinate titles or rights of any kind belonging to third persons (§§ 6, 8, 13). It then specifically provides that—

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.
>
> Par. 2, § 13.

Is this consideration for Indian rights at variance or in harmony with the rule of the act of 1851? If the former, that act stands out as the single and anomalous exception to the otherwise unbroken rule of legislative consideration for Indians; and embodies an inexplicable and underhand attack on rights uniformly held sacred before and since by every department of the Government. Out of all American Indians, the California Indians alone are singled out for spoliation; and the harmless and peaceful Tejons and other Mission Indians are disinherited by the same power that is active to protect the ferocious Apache and the turbulent Navajo or Ute. If, however, the other alternative is correct, the act of 1851 is a just and reasonable enactment in line with all

other Indian legislation; and the act of 1891 is a restatement of the same principles which the earlier act had more concisely embodied.

Observing the light thrown on the act of 1851 by the acts of 1850 and 1853, and recalling that the Act of March 3, 1891, was passed by the same Congress that passed the Act of January 12, 1891, recognizing the rights of California Mission Indians and providing for their defense, it is unmistakable that the act under discussion is, so far as Indians are concerned another legislative construction of the act of 1851.

We submit that it has been conclusively demonstrated that the act of 1851 did not require tribal Indians to present their occupancy title for confirmation. Whether the test be its general language, read as a whole, or its relevant sections examined in detail, or elementary rules of statutory construction, or a comparison with other statutes *in pari materia*, or the application of fundamental principles of Indian law, the result is the same; and §15, providing that decrees and patents alike "shall not affect the interest of third persons," will presently add further confirmation. When every passage in the statute and every extraneous test agree in result the demonstration is conclusive.

And we further submit that by this, and without more, we have established our case and earned a reversal. The only question before the court is whether the act required the submission to the Commission of the tribal Indian title. If it did not, that title still exists supported by immemorial possession

which even the lawless violence of appellees and their predecessors has not entirely destroyed; and, while the Court of Appeals was bound to follow *Barker* v. *Harvey*, if it believed it parallel, this court is subject to no such restriction. We will show that case not to be parallel; but, even if it were, its statement of legal theories unnecessary to the decision, if found to be at variance with the true meaning of the act of 1851, will not hamper the court now.

III.

Barker v. Harvey is not parallel or controlling here.

It is distinguishable in fact and in law as follows: (1) It was officially determined by the Mexican authorities that the Indians there involved had *voluntarily abandoned their occupancy* before Mexico granted the land; (2) as a natural result the grant which the Commission confirmed *contained no recognition of Indian possession, or protective provision in their favor;* (3) the Indian claim was presented as though *founded on a protective clause in an earlier grant*, which grant, however, the Commission had rejected (probably because unconfirmed by the Departmental Assembly,) and its true basis, viz: the tribal possessory title, was apparently not emphasized; (4) the Indian title was presented as *permanent* in the sense that no one, not even the United States, could extinguish it.

(1) Two Mexican grants were relied upon by claimant in the *Barker* case (pp. 482, 493–498), one originally made to Pico in 1840 but not approved by the

departmental assembly (p. 494), the other made in 1845 directly to Warner, claimant's grantor, and approved by the assembly (pp. 496, 497). The latter embraced the premises described in the former.

The commission held that claimant's right depended *entirely* on the second grant (p. 497), which it confirmed (p. 498). The expediente of this grant stated that the land claimed—

> is and has for the last two years been vacant and abandoned . . . but said place belongs at the present time to the said Mission. (p. 494).

The Supreme Court found as facts:

> The report of the justice of the peace was that the land had been for two years vacant and abandoned; that there were some property rights vested, *not in the Indians*, but in the Mission of San Diego, and the official of that Mission consented to the grant. (p. 498.)

And again:

> It thus appears that prior to the cession, the Mexican authorities upon examination *found that the Indians had abandoned the land.* (p. 499.)

With more to the same effect.

Here then, there was established by official Mexican investigation and judicially determined by the Supreme Court a fact *absolutely fundamental, and in itself conclusive of the whole case.* An abandonment being shown by the best evidence, the fee

was *ipso facto* relieved of the Indian title, and *nothing more was necessary to the decision of the case.*

> They [grants] were valid to pass the right of the crown subject to their [Indian] right of occupancy; *when that ceased . . . by the abandonment of the Indians the title of the grantee became complete.*
>
> *United States* v. *Fernandez*, 10 Pet. 303, 305; *United States* v. *Arredondo*, 6 Pet. 689, 747; *United States* v. *Cook*, 19 Wall. 591.

In the case at bar, however, the land in controversy *has been immemorially occupied and is still occupied* by the Indians, except as to parts thereof from which they have been wrongfully and forcibly expelled by appellees or their grantors (Complaint, pars. v, ix, x). The distinction is vital. This feature of voluntary abandonment was recently recognized by this Court in *Cramer* v. *United States*, 261 U. S. 231–2, as distinguishing that case from the *Barker* case.

There being therefore a plain fact in itself conclusive of the case, the legal discussion in the first part of the *Barker* opinion was academic and unnecessary to the decision.

(2) In the *Barker* case the unapproved Pico grant of 1840 contained a prohibition against molesting the Indians (p. 493). The approved Warner grant of 1845, however, said nothing about them (pp. 495-6), in all probability because they had already relinquished their rights by abandoning the premises. The latter was the grant that was confirmed. This court says:

> *No such condition* (of non-interference) *was attached to the subsequent grant to Warner.* (p. 498.)

And again:

> The Mexican authorities . . . *made an absolute grant subject only* to the condition of satisfying whatever claims the Mission might have. How can it be said, therefore, that when the cession was made by Mexico to the United States, there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, *and carried with it an affirmation that they had abandoned their occupancy*, and that whatever of title there was outside of the Mexican nation, was in the Mission, and *an absolute grant was made subject only to the rights of such Mission. For these reasons* we are of opinion that there is no error in the rulings of the Supreme Court of California. (p. 499.)

In the case at bar the grant was made on the express condition that the grantees "must not interfere with the cultivation and other advantages that the Indians who are found established in said place have always enjoyed." The grant containing this recognition of the Indian occupancy by Mexico was confirmed by the commission, and approved by both appellate courts.

When, therefore, the *Barker* case reached the courts the Indian title was non-existent by reason of abandonment and *the Mexican government, recogniz-*

ing this fact, made an absolute grant; while in our case the Indian occupancy existed before the grant, *was recognized and protected by Mexico in the grant*, and has continued down to the present time.

Under the last subhead, therefore, we had abandonment as contrasted with existing possession; now, we have governmental recognition of the abandonment as contrasted with governmental recognition of existing possession.

An indication of the failure of the Court of Appeals to grasp the facts is given by its statement (288 Fed. 823) that "in one of the two cases there [*Barker* v. *Harvey*] under consideration, the grant did contain words of protection of the Indian rights"—as though there were no difference between the *Barker* case and this case in that regard. The court overlooked the circumstance that those words occurred only in the earlier grant, which the Mexican Assembly had not approved and which the Commission rejected, and were absent from the grant which this court considered.

3. In the *Barker* case, the court evidently considered the Indian claim to be in some way *based on the protective provision in the first and unconfirmed grant.*

> If these Indians had any claims *founded on the action of the Mexican government*, they abandoned them by not presenting them to the Commission for consideration. (p. 491).

Now, if the provision in the grant had *created* the Indian title, it would be "derived from Spain or Mexico" (Act of 1851, §8), and there might be some

ground for saying that it should be presented to the Commission, although even this would be a harsh, extreme and anomalous construction in the case of Indians *non sui juris*.

Our claim, however, is different. It is no more *founded* on the action of the Mexican government, than, if land comes into the ownership of X already charged with an easement, and X conveys the fee specially mentioning and excepting the easement in his deed, the right to the easement would be founded on the exception in X's conveyance. Our claim is based on the general and immemorial Indian title, of which the provision in the grant was *not the foundation, but merely a recognition and protection*.

It will be noted that the Court of Appeals totally overlooked this point. Quoting the above passage from the *Barker* case, it says that it answers the contention that the Indians were not required to present their claim to the Commission, failing therein to observe that the Tejon Indian claim is neither founded on nor derived from any action by Mexico. This error or oversight appears again when the same court says (288 Fed. 824):

> It is well established by a line of decisions of the Supreme Court that any *grant* under the Mexican government is lost and abandoned if not presented to the Land Commission.

The court completely fails to appreciate that the Indian claim here is not a *grant* in any sense of that word. If it had been, there would be some ground for holding that it should have been submitted to

the Commission. Anyone alert enough to secure a grant would presumably be competent to protect it. But this is not a grant, nor is it derived from Mexico, nor founded on its action.

(4) Our fourth point of distinction is that in the *Barker* case the Indians are treated as claiming that *their occupancy was so fixed and permanent that no one could extinguish it, not even the government.* They are said to have claimed "a right of permanent occupancy" and it is stated that "the government of Mexico had always recognized the permanence of their occupancy." (p. 482.)

What the court understood by "permanent occupancy" is shown on pages 491–2, where it says:

> If it be said that the Indians do not claim the fee, but only the right of occupation . . . it may be replied that a claim of a right to *permanent occupancy* of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of *permanent occupancy* were a part of the public domain, and *subject to the full disposal of the United States.* There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of a prior government to a *right of permanent occupancy,* for in the latter case the right, which is one of private property, antecedes and *is superior to the title of this*

government, and limits necessarily its power of disposal.

With more to the some effect.

Clearly the court had, or supposed it had, before it an assertion of an occupancy fixed, immutable and permanent beyond the power of the United States to extinguish it. Otherwise it would not have ignored the score or more of its own decisions holding that the Indian right is one of possession, *perpetual except as against the government, but always subject to the government's right to acquire it.*

No such claim of inextinguishable occupancy is made in the case at bar. Our claim is that the Indian right was original, and indefeasible except as against the government; that Spain or Mexico had the right to extinguish or acquire it, but did not; that the latter on the contrary, in accordance with the uniform tenor of its laws, made clear that the intention of the grant was not to extinguish it, and warned the grantees against interference; that, however, it still retained the right to acquire it later if so disposed, just as the United States has often granted land subject to the Indian title which it has later acquired; that the confirmation by the commission and the issuance of the patent left the situation unchanged; and that the United States has still the right to extinguish this or any similar Indian title, but that appellees have no right to do so. This is as different from the position rejected in *Barker* v. *Harvey* as white from black.

From all this it is clear that the *Barker* case is radically and vitally distinct from the case at bar; that not only were different facts then before the court, but that different theories of law were urged and passed on.

It is noteworthy that in *Minnesota* v. *Hitchcock*, 185 U. S. 373, decided one year later than the *Barker* case, this court, in an opinion written by the same Justice, upholds an Indian occupancy title, announcing that the government could convey the fee title to public land subject to Indian occupancy; that the grantee would take complete title only when that occupancy terminated; that the occupancy title was always held sacred and could not be extinguished without Indian consent, and then only upon compensation; and that statutes must be construed favorably to Indians. All of which indicates that this court considered in the *Barker* case that it had an entirely different situation before it than the one now presented.

5. What, then, is the effect of the legal discussion forming the first half of the opinion? One of two things is true: (a) That discussion was perhaps invited by erroneous contentions that the protective clause in the first grant founded or created a title, and that that title was fixed and permanent beyond the power of the government to cancel it. If so, the remarks have no bearing whatever on the case at bar. (b) In so far as the general possessory title was under consideration, the discussion was "unnecessary to the decision and in that sense extra-

judicial" (*Hans* v. *Louisiana*, 134 U. S. 1, 19, 20), because that title had been extinguished by the sole fact of voluntary abandonment.

Now, however, the United States comes with a set of facts vitally different and for the first time requiring a decision on the points of law academically discussed in the earlier case. Under such circumstances this court has repeatedly announced that the extrajudicial duscussion is not controlling.

> Any opinion given here or elsewhere cannot be relied on as a binding authority *unless the case called for its expression.* Its weight of reason must depend upon what it contains. *Carroll* v. *Carroll's Lessees*, 16 How. 275, 287.
>
> And, therefore, this court . . . *has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.*
>
> *Pollock* v. *Trust Co.*, 157 U. S. 429, 575.

To the same effect, in a great variety of situations, see:

> *Brooks* v. *Marbury*, 11 Wheat. 78, 90;
>
> *Hans* v. *Louisiana*, 134 U. S. 1, 19, 20;
>
> *McCormick Co.* v. *Altman*, 169 U. S. 606, 611;
>
> *United States* v. *Wong Kim Ark*, 169 U. S. 649, 678–9;
>
> *Downes* v. *Bidwell*, 182 U. S. 244, 258, 270;
>
> *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291;
>
> *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 538;

Union Tank Line v. *Wright*, 249 U. S. 275, 283–4.

Indeed, the *Barker* case itself seems to recognize that its first half is speculative only. Leaving it to discuss the actual abandonment, it says (p. 493):

> Turning to the testimony offered in respect to the matter of occupation, it may be stated that *there was sufficient to call for a finding thereon if the fact of occupation was controlling.*

The words italicized indicate that in spite of everything the court had said, it considered that there would still be a justiciable controversy if there had been no voluntary abandonment subsequent to which the Mexican Government granted the unincumbered fee.

6. There are two statements of law in the *Barker* case which are hard to discuss, because it is impossible to be certain whether, as we believe, they apply only to the peculiar sort of title there apparently claimed, or whether, as appellants contend, they announce a general rule applicable even to an Indian tribal title, such as is presented here, protected but not created by a Mexican grant.

One is that "public domain" is the same as "public lands"; that lands encumbered with the Indian easement or use cannot be treated or considered as "public lands" in the ordinary sense; and that, therefore, when § 13 of the act of 1851 made lands to which claims had not been presented part of the public domain, it intended to extinguish the Indian title wherever unpresented.

The other is that when § 15 provides that decrees and patents alike "shall be conclusive between the United States and the said claimants only and shall not affect the interests of *third persons*," the last two words do not mean what they say, but denote some special and restricted class among whom Indians are not included.

It seems probable that Barker, recognizing that the Indian tribal title had been lost by voluntary abandonment, officially declared, and followed by the omission of the protective clause from the second grant, was driven to take the indefensible position *that the protective clause in the first grant conferred upon the Indians permanent and inextinguishable possession.* If this was the contention, it would explain much that is otherwise inexplicable in the decision; and would emphatically distinguish it from the case at bar. If, however, these two statements can be supposed to apply to such a situation as is here presented, we respectfully submit that they are entirely out of line with all other decisions of this court and cannot be sustained.

(a) Taking up the first, we notice that while it would have been perfectly easy for Congress, if so minded, to have said that unclaimed land should become part of the "public lands of the United States" it did not in fact do so. It said "public domain."

Now, while these expressions are sometimes loosely used as equivalent, it is perfectly obvious that they are not in fact synonymous. A national park, or a

forest reserve, or an Indian reservation is certainly part of the public domain, and as certainly not a part of the "public lands of the United States" in the sense of lands subject to sale or disposal under general laws. The ground occupied by lighthouses, post offices, coast defenses, national cemeteries, military camps and the like is certainly public domain. But it is not public land of the United States in the technical sense.

In view of all the other reasons against the inclusion of Indians within the requirements of the act, it is consistent to conclude that Congress purposely and not negligently or accidentally used the wide words and not the words which had received a narrow and limited construction, in order to show by one more indication that the Indian title was to remain unaffected by the act.

What is really meant by "public domain" is seen in *Missionary Society* v. *Dalles*, 107 U. S. 336, where the court, referring to the act of 1848 organizing the Territory of Oregon, said (p. 344):

> The *public domain* included within the Territory of Oregon by the Act just mentioned, had not then been surveyed, nor was it open to settlement, pre-emption or entry. . . . The title was in the United States *subject to the possessory Indian title to portions of the Territory.*

This was exactly the situation in California at the time of the act of 1851. There had been no surveys and the public land laws were not applied to

the state until March 3, 1853 (10 Stat. 244). To public lands of that status the Supreme Court applies with precision the term "public domain," by which Congress in the act of 1851, with equal precision, described lands unclaimed, or the claims to which had been rejected by the Commission. In both cases "the title was in the United States *subject to the possessory Indian title to portions of the territory.*"

To the same effect are—

> *Buttz* v. *Northern Pacific Ry.*, 119 U. S. 55, 70;
> *St. Paul etc., Ry. Co.* v. *Phelps*, 137 U. S. 528, 541–2.

But while the use of "public domain" instead of "public lands" in the ordinary use of language makes it clearer that the unclaimed land fell into a classification to which the Indian title might, and commonly did, attach, yet we have no need to stress the words unduly. The same result would be reached even if Congress had said "public lands of the United States," *since land may be and often has been treated as public land of the United States, although admittedly subject to the Indian title of occupancy and possession.*

In construing an act granting a right of way through the "public lands," the Supreme Court, in a much more recent case than *Barker* v. *Harvey*, says:

> But it is said that the right of way section was inapplicable because it was confined to "public lands," a term used to designate such

> lands as are subject to sale or other disposal under general laws. *No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense.* We think that is the case here, first, because the provision in the same section that the United States should extinguish as rapidly as might be *the Indian title to all lands required for the right of way implies that Indian lands as to which Congress properly could grant a right of way were intended to be included.*
>
> *Kindred* v. *U. P. R. R. Co.*, 225 U. S. 582,596.

Here then, lands in the possession of Indians might be none the less "public lands" and the United States might grant them and extinguish the Indian title later. The *Barker* v. *Harvey* statement is corrected. That case presses this point to the extent of saying (p. 491):

> It could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States.

And again (p. 492):

> Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing confirmation of that claim if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy.

Now, whatever may have been claimed in *Barker* v. *Harvey*, we do not claim in the case at bar an inextinguishable right of Indian occupancy. We know

of no such right. We do claim, however, a right of occupancy *inextinguishable except by the government.* We do not contend that the requirement in the Mexican grant of non-interference with the Indians *by the grantees* made the Indian right absolute and perpetual *as against the government.* We claim for this title the status of a tribal Indian title resting primarily on the general right of occupancy and fortified by a recognition of it in the grant as an existing right, with a prohibition against interference with it *by the grantees,* thus making clear the fact that in granting the fee Mexico did not intend to extinguish the Indian title. We do not at all argue that the Mexican government prior to 1846, or the United States government afterwards, could not have extinguished it. We do argue, however, that only the government had the power to do so; that the grantees and their successors had no such power and that the Indian title is permanent *until the government sees fit to act.*

The opinion in *Barker* v. *Harvey* is in some respects elusive and hard to understand. If, however, it means that the claim there was for a perpetual Indian right beyond the power even of the government to extinguish, that fact alone distinguishes it so radically from the case at bar as to make it worthless as an authority against us.

Returning to our present topic, however, lands subject to the ordinary Indian title above described and here claimed, have over and over again been treated as public lands both of Mexico and the United States and have been granted subject to that

title. This is demonstrated by the cases already cited under I (7) *supra*. They may not have been so granted under general laws, but as we have just seen "public lands" does not necessarily mean lands grantable under general laws—still less does "public domain." If *Barker* v. *Harvey* contradicts this, it is a reed broken by a ponderous weight of authority emanating both earlier and later from the same court.

(b) Section 15 of the act of 1851 reading—

> That the final *decrees* rendered by the said Commission or by the District or Supreme Court of the United States, or *any patent* to be issued under this act *shall be conclusive between the United States and the said claimants only, and shall not affect the interest of third persons,*

in plain and simple language preserves the Indian title under decree and patent alike until the government itself affirmatively acts to extinguish it.

In the first place we note that the Commission itself so held in this very case. Referring to the protective provision in the grant it says:

> This restriction we have heretofore decided, *does not affect the right of property*, though it may create a use in favor of Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal. (Complaint, par. vii.)

The recognition in the grant of the Indian title is thus declared to be consistent with and unaffected by the passing of the fee. The Indians were "third

persons." The Indian use or easement is left to the protection of a court of equity if ever it were questioned or interfered with. The commission, therefore, deciding that its function was solely to determine whether the fee was in public or private ownership, declared that it had no jurisdiction to pass on the Indian title. Its decision containing this passage was affirmed by the District Court and an appeal was dismissed by this court. Yet, if appellees' position is correct, this refusal to take jurisdiction was error and the case should have been reversed. This court, however, thought otherwise. We submit that the announced lack of jurisdiction of the Commission in this particular thus became the law of the case; that it constitutes *res judicata;* that the trial court here in taking a contrary position in effect overruled this court; and that its judgment should now be reversed on this ground alone.

And if this decree, thus affirmed, expressly states that it does not affect Indian rights, how can the patent which followed it, and which the act puts on the same footing as the decree, affect them?

But we do not need to rest on this. We confidently submit that *Barker* v. *Harvey* is demonstrably wrong if it means that the Indians here concerned are not protected by the provision that decrees and patents shall not affect third persons. Its statement to that effect is based solely on *Beard* v. *Federy*, 3 Wall. 478, 492, where it is said:

> The term "third persons" as there used, does not embrace all persons other than the

> United States, and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the Government in disposing of the property.

A very slight examination of the *Beard* case and its successors, however, is enough to show that this definition contemplated merely the narrow facts of the case then presented and was not and could not be intended to be exclusive.

The claim of the Bishop of Monterey as a corporation sole to 19 acres of church land, was confirmed by the commission and a patent issued. Later his grantee brought ejectment against one who occupied under a subsequent and unrecorded Mexican grant, made a few days before the end of Mexican sovereignty, unapproved by the Departmental Assembly and which had never been presented to the commission for confirmation, and was therefore void for the two reasons last mentioned. The defendant contended that he was a "third person" under § 15; that as against him the patent was not evidence for any purpose and that the whole question as between the Bishop's title and the governor's grant remained open as though no proceedings before the commission had ever been had. The court with unquestionable accuracy held that the United States patent showed that the Bishop's claim was valid under the law of Mexico; might have been located under the former government and was correctly located now; and that it was conclusive not only

against the government, but "against parties claiming *under the government by title subsequent*"—in other words, such parties as the defendant. *With reference, therefore, to the facts before it,* the court stated that "third persons" meant "those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property"; in other words, the only persons who could come into court and *attack the patent* or maintain that "the whole subject of titles is open precisely as though no proceedings for the confirmation had ever been had and no patent for the land had been issued" (p. 491) are those who could show another patent issued upon a confirmed grant, or some title of equal dignity *which could have been set up against the Mexican or American government itself,* when the one made the grant or the other issued its patent.

In the instant case we make no attack whatever upon the patent. We merely contend that when it was made a small portion of the land it covered was and still is subject to a recognized Indian title. We are merely asserting that the fee to that part passed subject to an Indian easement or use as it has repeatedly passed in other cases. *Beard* v. *Federy,* therefore, presents no similarity to the facts here involved.

It is too clear for argument that when Congress said that decrees and patents "should not affect the interests of third persons" they did not mean *only* such third persons as are described in *Beard* v. *Federy.* Suppose the Mexican grantee had given a lease

which was outstanding when he presented his grant and received his patent. Would anyone doubt that the lease remained valid unaffected by the confirmation or patent? Suppose that in the devolution of the granted title under Mexico the fee had become subject to a life estate in XY. Would anyone suppose that a confirmation and patent to AB would extinguish the life estate? Suppose that the fee was subject to an easement of right of way. Could anyone conceive that the confirmee would take title discharged of that easement?

In other words, the term "third persons" necessarily has a general signification outside of the restricted application required by the narrow and unusual facts of *Beard* v. *Federy*. It necessarily includes exactly the sort of persons of whom the tribal Indians are examples. This view is confirmed by repeated decisions of the Supreme Court:

> Whether the legal title thus secured to the patentee was to be held by him *charged with any trust was not a matter upon which either board or court was called to pass.* If the claim was held subject to any trust before presentation to the board, *that trust was not discharged by the confirmation and subsequent patent.* The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it *does not determine the equitable relations between him and third parties.* . . . *If the trust was not stated and did not appear*

> the legal title was none the less subject to the same trust in the hands of the claimant.
> *Townsend* v. *Greeley*, 5 Wall. 326, 335.

In another case the commission had confirmed a forged grant and patent had issued upon the confirmation. The genuine grantees also had separately presented their claim to the commission, which rejected it, misled by the forged evidence which caused the confirmation to the pretended grantee. Later the genuine grantee brought suit to have the fee title in the hands of the fraudulent grantee impressed with a trust, which was done. The court says:

> It is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was *final and conclusive between the original claimants.*

After agreeing with the general principle that the decision of a tribunal with jurisdiction is usually conclusive and that even fraud does not always open such decision, the court continues:

> But it is not important to enter much into that field of inquiry, as the fifteenth section of the act under which the commissioners were appointed provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States, or any patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons. *Nothing more is contemplated by the proceedings under that act than the separation of the lands which were owned by individuals from the public domain—*

with much more to the same effect:

Meader v. *Norton*, 11 Wall. 442, 457.

Again we note:

> It is true that the 15th section of the Act declares that the decree of confirmation shall be conclusive between the United States and the claimants only and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceedings who might have Spanish or Mexican claims independent of or superior to that presented by claimant, *or the equitable rights of other parties having rightful claims under the title confirmed.* * * * *The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off.* Their equities were reserved. But they must seek them in a proceeding appropriate to their nature and condition.

Drawing a parallel between the situation before it and a patent granted to a pre-emption claimant, the court continues:

> Whilst the patent in that case confers the legal title and admits of no averments to the contrary, the patentee *may be subject in equity to any just claim of a third party even to the extent of holding the title to his sole use.*
>
> *Carpentier* v. *Montgomery*, 13 Wall. 480, 495–7.

The court in this opinion refers to *Beard* v. *Federy*, *supra*, and evidently had in mind to correct any misapprehension that might arise from the narrow application given to "third persons" in that case.

The foregoing is unmistakable. It is supported, if support can be thought necessary, by the decisions of this court that the patent issued under the act of 1851 was *a confirmation in a strict sense*, neither adding to nor subtracting from the title as granted by Spain or Mexico. At first the patent was likened to a quit-claim (*Adam* v. *Norris*, 103 U. S. 591, 593), but this was presently corrected.

In *Boquillas Co.* v. *Curtis*, 213 U. S. 339, 344, this court says:

> The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, *but releases that of the United States; Beard* v. *Federy*, 3 Wall 478, 491; and that by the grant from the United States, it gained rights as a riparian proprietor that cannot be displaced by a subsequent attempt to appropriate the water. But while it is true that in *Beard* v. *Federy, supra*, Mr. Justice Field calls such a patent a quit claim, we think it rather should be described as a confirmation *in a strict sense*. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid; so that the confirmation doth not regularly create an estate." *It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant.*

See, also,

Los Angeles Milling Co. v. *Los Angeles*, 217 U. S. 217, 227, 233;

Wilson Cypress Co. v. *Del Pozo*, 236 U. S. 635, 649.

In this connection we invite the attention of the court to the relevancy of the cases cited under I (7) and I (8) *supra*. It was there established by Supreme Court decisions, first, that the Indian title is not extinguished by a mere grant in fee by the government; second, that it is extinguished only by words or acts affirmatively showing such intent; and third, that throughout the history of this government, and its predecessors, it has never been extinguished without compensation. Each one of these principles confirms the provision that Indians are among the "third persons" whose right was to remain undisturbed by decrees or patents.

We submit that the foregoing considerations and decisions dispose of the contention that Indians are not "third persons" under §15, and affirmatively show that they come directly within the protection of the act in that regard.

7. All the foregoing discussion goes to show how completely the Court of Appeals failed to grasp the essentials of our case. That court treats the Indian claim as though resting on the protective provision in the Mexican grant and alludes to it as itself a grant, overlooking the fact that what we are asserting is the original tribal title, in no way derived from or granted by Spain or Mexico, the mention of which

in the grant was merely a recognition of its existence and an injunction against interference with it. It apparently thinks that we urged such recognition as a reason why the Indian claim need not be presented to the Commission, whereas our argument was that the act of 1851 did not require the *Indian tribal title* to be submitted, the recognition in the grant having nothing whatever to do with that question. It says that the *Barker* case answers all our contentions, ignoring all distinctions between that case and this, there as here carefully outlined, especially failing to note that in the *Barker* case the occupancy title not only had no other basis than the grant, but was asserted to be so permanent as to be "superior to the title of this Government" and beyond its power to extinguish. Finally, it says that the *Barker* decision "is in harmony with and in fact is foreshadowed by prior decisions of the Supreme Court," citing:

Beard v. *Federy*, 4 Wall. 478;
Botiller v. *Dominguez*, 130 U. S. 238;
Knight v. *Land Association*, 142 U. S. 161;
Thompson v. *Farming Co.*, 180 U. S. 72.

Bearing in mind that the essential question is whether the act of 1851 required the submission of the Indian tribal title to the Commission, we note that the Bishop's claim in the *Beard* case, although founded on general laws, was admittedly a title "derived from the Spanish or Mexican Government." It arose under and by virtue of those laws and with-

out them had no existence, whereas the Indian title preceded them and had an independent existence. The United States patent is said to be "conclusive against parties claiming under the Government by title subsequent" (p. 492). Obviously the Indians are not such parties. The narrow interpretation of the term "third parties" was later corrected by this court as already shown.

In the *Botiller* case the one question considered was whether all titles, perfect or imperfect, "*derived from the Spanish or Mexican Government*" were to be presented to the Commission. This limitation is reiterated again and again (pp. 242, 248, 253, 255). But the Indian title was not so derived.

The imperfect and inchoate titles which were to be presented are described as those "where the initiation of the proceedings necessary to secure a legal right and title to the property had been commenced, but had not been completed" (p. 247). The Indian title, then, does not fall within this description.

As to the policy of the act of 1851, it is said:

> Obviously, it was not intended to adjust or settle titles between private citizens making claim to the same land.

Its main purpose was to separate lands owned by the United States from those (p. 249)—

> which belonged either legally or equitably to private parties under a claim of right derived from the Spanish or Mexican Governments. *When this was done, the aim of the statute was attained.*

Clearly, the fee claimant only need present his title; the Indians need not.

The result of a failure to present a claim was "that the lands covered by it should be considered a part of the public domain" (p. 254). But land not granted by a preceding Government was public domain whether Indians occupied it or not.

We ask the court's special attention to this decision, which upholds many of our contentions and furnishes singularly cold comfort to appellees.

The *Knight* case has no application whatever here except in quoting from the *Beard* case a passage already distinguished.

The *Thompson* case was an attack on the power of the Commission to confirm a grant, on the ground that it was *ultra vires* of the Mexican Governor who made it; and this court naturally points out that such question should be presented by appeal from the Commission and not by collateral attack. It says that the purpose of the act was to give repose to titles, but shows the sort of titles meant by adding, "It was enacted . . . to settle and define what portion of the acquired territory was public domain" (p. 77). Once more, it is the fee title which is under discussion, while in our case there is no attack on the fee and no title is urged inconsistent with fee ownership either by the Government or by appellees.

We have discussed the *Barker* v. *Harvey* case at perhaps unnecessary length. The decisive question here is whether the act of 1851 required Indians to

present their tribal title for adjudication and confiscated it if not presented. Since clearly it did not, no earlier decision will prevent this court from so holding. It seemed worth while, however, to demonstrate that the *Barker* opinion offers no obstacle to such finding. If it did, we would frankly ask the court to overrule it, as irreconcilable with primary principles of Indian law, the plain meaning of the act of 1851, and an imposing array of other Supreme Court decisions. As it is, the voluntary adandonment by the Indians made the result inevitable, and the remainder of the decision is occupied with the refutation of erroneous theories of law which find no place in the Government's contentions here.

IV.

Appellees urged before the Court of Appeals that a reversal would upset a rule of property established by the *Barker* case and cause widespread confusion of titles. A very brief answer will suffice.

1. The rule they contend for, stripped of all pretence, is that after that decision no tribal Indian in California had any right whatever to remain on the land from which he had immemorially won his living. Any land owner at his pleasure might kick him into the highway and leave him to starve. We do not believe that this court ever announced or is now ready to stand sponsor for a rule so frankly brutal.

2. *A rule of property can be no wider than the facts ruled on.* The only rule founded on the essential facts of the *Barker* case is that Indians who volunta-

rily abandon their possession lose their possessory title.

3. The *Barker* case passed on an Indian possession which the Mexican Government had ceased to protect because the possession itself had ceased to exist; but which yet was presented as though created and established by Mexico so permanently that even the United States could not extinguish it.

4. Appellees not only had notice of actual Indian possession existing for 15 years after the *Barker* decision before they themselves acquired title, but their own chief muniment of title, the decree of the Commission, affirmed on two appeals, embodied a statement that there was an outstanding Indian use which the Commission had not adjudicated because it had no jurisdiction so to do.

5. Even if the *Barker* case had been parallel, it would not establish a rule of property because such a rule is not established by a single decision. So this court has repeatedly held in the far more delicate cases where it was deciding whether or not to follow a construction of local law announced by a state court. Such construction is authoritative only when "established by *repeated decisions* of the highest courts of a State" (*Bucher* v. *R. R. Co.*, 125 U. S. 555, 584); or "fully settled by *a series of adjudications*" (*Chicago* v. *Robbins*, 2 Black 418, 428); or where the courts have established "by *repeated decisions* a rule of property in regard to land titles peculiar to the State" (*Yates* v. *Milwaukee*, 10 Wall. 497, 506); or "a rule established by a *course of decisions* made

before the rights of parties accrued" (*Kuhn* v. *Coal Co.*, 215 U. S. 349, 369).

So far is the *Barker* case from being one of a series of decisions to the same effect that, in the passages construed by appellees as favorable to them, it stands alone, while their construction of those passages is contradicted one year later in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389, and very recently in *Cramer* v. *United States*, 261 U. S. 219, 227–8–9; 231–2.

If appellees invoke the doctrine of *stare decisis*, that principle "is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided" (*Hartz* v. *Woodman*, 218 U. S. 205, 212), and further it "only arises in regard to decisions *directly upon the points in issue*" (*Pollock* v. *Trust Co.*, 157 U. S. 429, 574–5). *Stare decisis* is not involved here at all.

If anything more were necessary, the appellees' plea of injustice arising from their reliance on the *Barker* case is overthrown by this court, when it said:

> Of course the fact, if it be such, that the present claimant was a *bona fide* purchaser in good faith, who, in reliance upon the action of Congress with reference to similar grants, expended large sums of money on the faith of the validity of the title which he supposed he had acquired, cannot influence the action of this court.

Their recourse must be to another department of the government.

Hayes v. *United States*, 170 U. S. 637, 654;
Crespin v. *United States*, 168 U. S. 208, 218.

6. The disastrous effect on titles anticipated as the result of a reversal is imaginary.

This of course is entirely outside the record. But, even if it were relevant, a case like this, where Indian possession continues in the spot where it has immemorially existed is one of a thousand. California Indians, where not on reservations, are scattered hither and yon and buffeted from pillar to post, and the instances where it would be possible to prove long-continued possession, or to negative the idea of abandonment are few indeed.

Even if the impossible were possible and California Indian occupancy of their present abodes could in general be proved, the acreage and value of the land thus secured would be trivial. It is common knowledge that they occupy the most worthless and least desirable lands in the state, whither they have been driven by the greed and violence of the whites. The Tejon Indians have preserved their homes only because living in a remote nook in the foothills of the Sierra Nevada, miles away from towns, railroads or public roads.

The government has no purpose to put back the clock. In most cases the shameful wrongs of the Indians are now irremediable, except by government bounty. But here is a live case where the Indians still retain part of their primeval possession under every right, legal and equitable, but where they are being steadily driven back, oppressed and

held in bondage by a force which they are entirely unable to resist. Here is an opportunity to do a striking deed of justice which means comfort and security to a helpless and harassed band with the minimum of loss to the enormous interests represented by appellees.

We submit that the reasons presented for reversal are conclusive. Bearing in mind the sacredness and dignity of the Indian title, which yet is held by a helpless people, *non sui juris*, needing and uniformly receiving the fostering care of courts and Congress alike; the recognition and protection of it by Mexico when the fee title passed into private ownership; the treaty pledge of our national faith to preserve it; the tenderness for similar Indian rights shown by Congress in synchronous and subsequent enactments; and the established fact that throughout our history the Indian title has never been extinguished casually, silently or without compensation. the court will approach the act of 1851 looking to find these things respected therein and not nullified.

It will be observed that under our construction the act is a plain, just and reasonable enactment, consistent with the above principles, well adapted to distinguish private land from public domain. but leaving the Indian rights attaching to either to await the action of Congress, enlightened by the report of the commission on that subject. On the other hand appellees' theory of the act contemplates an outrageous injustice, involves amazing absurdities; perverts the plain meaning of

language, violates established principles of construction, contradicts doctrines repeatedly announced by this court, including the general principles just stated above, and rests on a single case distinguishable both in fact and law from the case at bar.

Conclusion.

The decision of both lower courts should be reversed, with directions to the District Court to overrule the motion to dismiss and fix a time for defendants to answer.

Respectfully submitted.

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